86-518

NO. 86-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EVERGREEN TOWERS, INC.,
Petitioner,

vs.

CITY OF EAST ORANGE and STATE OF NEW JERSEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Statement of Questions Presented

1. Does the current New Jersey real property tax appeal scheme work forfeitures in violation of the Fourteenth Amendment's due process clause in that it requires partial prepayment of taxes as a jurisdictional requisite to challenging an assessment?

2. If the answer to the preceding question is in the negative, is a forfeiture worked by that statutory scheme where the taxpayer is unable to pay the taxes because it is impecunious?

3. Is the preceding constitutional provision violated by a statutory scheme that requires different portions of payment at various levels but permits a governmental instrumentality to vitiate the appeal process where the taxpayer had paid a judicially determined amount and then is required to pay the remainder of the taxes as the result of the government's appeal, despite an inability to pay?

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NO. 86-

IN THE

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OCTOBER TERM, 1986

EVERGREEN TOWERS, INC.,

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vs.

CITY OF EAST ORANGE and STATE OF NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Opinions Below

No opinions are reported. The state Appellate Division Opinion is reported at pages 1a to 9a, post.

Statement of Jurisdiction

This Court's jurisdiction is invoked to review a final judgment of the Supreme Court of New Jersey of June 27, 1986 and entered on its docket on June 30, 1986 denying certification to review the final judgment of the Superior Court of New Jersey, Appellate Division. Statutory jurisdiction is premised on 28 U.S.C. Sec. 1257(3).

Constitutional Provisions, Statutes and Regulations Involved

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statute Annotated Section 54:3-21.

A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, may, on or about August 15, appeal to the county board of taxation by filing with it a petition of appeal; provided, however, that any such taxpayer or taxing district may, on or before August 15, file a petition of appeal directly with the tax court, if the assessed valuation of the property subject to the appeal exceeds $750,000.00. . . .

New Jersey Statute Annotated Section 54:3-27.

A taxpayer who shall file an appeal from an assessment against him shall pay to the collector of the taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request a reduction in excess of one quarter of the taxes assessed for the full year. The collector shall accept such amount, when tendered, give a receipt therefore and credit the taxpayer therewith, and the taxpayer shall have the benefit of the same rate of discount on the amount paid as he would have on the whole amount.

New Jersey Administrative Code Section 18:12A-1.6(d).

A taxpayer who shall file an appeal from an assessment against [it] shall pay to the collector of the taxing district no less than the first three quarters of the taxes against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request reduction in excess of one quarter of the taxes assessed for the full year. A county board of taxation shall not enter a judgment regarding a tax appeal filed by a taxpayer unless the first three quarters of the current year's taxes have been paid and unless the municipality has applied to the County Board for a dismissal of the taxpayer's appeal.

Statement of the Case

A. Introduction.

Petitioner is a New Jersey taxpayer. Respondents are the City of East Orange ("City") and the State of New Jersey ("State"). Petitioner seeks to have this Court examine the constitutionality of New Jersey's real property tax appeal scheme insofar as state statutes require partial payment of taxes prior to challenging a real property assessment. The scheme has certain oddities. The County Board of Taxation is the local administrative agency with original jurisdiction. It can waive the requirement until a motion to dismiss is made. The New Jersey Tax Court, a legislative court with relevant reviewing jurisdiction, apparently cannot waive. In this case, petitioner paid taxes at pre-challenge rates. The relevant assessment was reduced by the County Board of Taxation from about $1.5 million to $604,000.00, a level below the assessment on which taxes were paid. The taxing authority, the City of East Orange, appealed. On that appeal, respondent City moved to dismiss because the taxes had not been paid in full.

Petitioner introduced evidence to establish inability to pay taxes. The New Jersey Tax Court ultimately allowed respondent City discovery on the issue to which petitioner apparently consented. Petitioner ultimately failed to give respondent City discovery.

The Tax Court dismissed (pp. 3a-4a, post). The Superior Court of New Jersey, Appellate Division affirmed on the discovery basis (p. 9a, post). The Supreme Court of New Jersey declined to exercise its discretionary jurisdiction (pp. 10a-12a, post).

What distinguishes this case from conceivable configurations is that: (a) taxpayer won the first round; (b) it had paid taxes at rate higher than the rate at which it prevailed; and, (c) it was the *City* that took the procedural step that triggered the requirement to pay taxes. Simply by appealing the County Board decision and then moving to dismiss the City triggered the requirement that taxes be paid.

B. Statement of Procedural History

On November 15, 1980, the Essex County New Jersey Board of Taxation entered judgment reducing respondent's 1980 real property assessment from $1,500,000 to $604,700. The Board entered judgment despite respondent City's motion to dismiss for failure to pay taxes.

On November 24, 1980, respondent City filed a Complaint with the Tax Court of New Jersey alleging that the County Board judgment was erroneous. Respondent answered and counterclaimed, alleging the assessment as reduced was still excessive and should be further reduced.

On September 9, 1983, the Tax Court reversed the judgment of the County Board for failing to grant respondent City's motion for dismissal for nonpayment of taxes as required by N.J. Stat. Ann. Sec. 54:3-27 and reinstated the original assessment for the year 1980, which was $1,500,000.

On September 10, 1983, petitioner filed a Motion for Rehearing with supporting Affidavits, on the ground that the Tax Assessor had abused his office and had willfully and deliberately increased by more than double the previous three years' assessments, that the assessment was

confiscatory and that the requirement of tax pre-payment in the circumstances presented here was a deprivation of property without due process, thereby preserving the federal constitutional issue. (See p. 33a, post). Petitioner paid the tax in full in 1980 based on the 1979 assessment, which was higher than the reduced taxes.

On November 9, 1983, rehearing was granted:

> 3. . . . Said hearing shall be limited to the question of what the original assessment was for any of the years relative to this proceeding and to facts constituting constitutional aspects of a financial burdensome assessment.
>
> 4. Plaintiff may engage in discovery to determine the facts supporting the allegation of a financially burdensome assessment.

On November 16, 1983, respondent State of New Jersey was granted leave to intervene as to the constitutionality of the Statute requiring prepayment.

An Order for Dismissal, dated December 5, 1984 was entered for failure to engage in discovery, and on December 27, 1984, the Tax Court reversed increasing the assessment from $604,700 to $1,500,000 (pp. 3a-4a, post).

On January 31, 1985, Notice of Appeal was filed to the Superior Court of New Jersey, Appellate Division. On March 20, 1986, the Court affirmed (pp. 1a-9a, post).

On April 7, 1986, a timely Notice of Petition for Certification was filed to Supreme Court of New Jersey which denied relief on June 30, 1986 (pp. 10a-12a, post).

C. Factual Background

The lower court record evolves from pleadings and sworn papers, since there was never an evidentiary hearing in this matter. Petitioner owns 134 Evergreen Place, East Orange. The property is improved by a nine-story building built in 1964. The real property assessments for the three years preceding the present matter (1977, 1978 and 1979) were judicially determined. For the tax year 1977, the municipal tax assessor assessed the building at $1,333,-800, judicially reduced to $592,000. By application of New Jersey's "Freeze Act" petitioner froze its assessment for 1978 and 1979 at the 1977 level. Respondent City did not attempt to show any change in the value of the building from the original assessment date of October 1, 1976 for the tax year 1977.

As of the October 1, 1979 assessing date for tax year 1980, the annual gross income from the rent roll was $310,723. Actual building operational expenses were $196,-971. The resulting sub-total of $113,752 is further diminished by items for management, reserve, mortgage interest and real estate taxes not computed.

For tax year 1980, the East Orange Tax Assessor increased by more than double the tax assessment for each of the preceding three years. The land assessment remained at $183,700; but, the building assessment was increased from $592,100 to $1,316,300, totalling $1,500,000. At the gross rate of 8.22, the taxes claimed for 1980 amounted to $123,300, more than $10,000 in excess of net cash received, without any consideration for management, reserves and mortgage interest.

Notwithstanding the apparent earlier concession by respondent City that there was no change to warrant invoking New Jersey's Freeze Act, the October 1, 1979

assessment of the building for the tax year 1980 was $1,316,300, making a total assessment of $1,500,000.

As noted, respondent appealed to the Essex County Board of Taxation from this assessment for the tax year 1980. The Board did not require payment of taxes, despite respondent City's demand. On November 15, 1980 the County Board entered judgment reducing the building assessment to $421,000 and the total to $604,700.

Respondent City then appealed to the State Tax Court from the judgment of the County Tax Board. Respondent city again invoked N.J. Stat. Ann. Sec. 54:3-27 to require payment of taxes. The Tax Court granted discovery on a wide range of issues it found to be relevant to the corporation's ability to pay the taxes. These included income tax returns, loan applications, financial statements, bank records, brokerage account records and mortgage documents. Defendant's principals stipulated that they individually could pay the taxes. The Tax Court ultimately reversed for failure to pre-pay taxes, giving a failure to engage in discovery on the indigency issue as a reason.

D. The Appellate Decision

The Superior Court of New Jersey, Appellate Division affirmed. The court's opinion was premised on the finding that the trial court was justified in dismissing for failure to give discovery. The court held that "a review of this record further satisfies us that defendant's claim of a due process denial is groundless. Defendant was given every opportunity for a hearing to prove that compliance with the statute would be financially burdensome and failed to abide by the requirement of the [New Jersey] Rules of Court (p. 9a, post). The New Jersey Supreme Court declined to accept the matter. This petition follow:

LEGAL ARGUMENT

POINT I

New Jersey's statutory scheme violates the due process clause by requiring prepayment of taxes before a challenge to a real property assessment can be heard, both on its face and as applied in this case.

A brief understanding of New Jersey's prepayment requirement and tax appeal scheme is necessary to understand what happened there. At present, a taxpayer whose real property assessment exceeds $750,000 has the choice of commencing an action before the local County Board of Taxation or before the New Jersey Tax Court. *Compare* N.J. Stat. Ann. Sections 54:3-21 *and* 54:51A-1 with N.J. Ct. R. 8:2(b) *and* 8:3-5(a)(3). A County Tax Board decision is reviewable in a *de novo* proceeding in the state tax court. N.J. Stat. Ann. Sec. 54:51A-2. Proceedings here were commenced before the County Board of Taxation.

New Jersey statutes require that a taxpayer pay three quarters of the assessed taxes to be able to invoke review jurisdiction. N.J. Stat. Ann. Sec. 54:3-27. Recent decisions, however, have taken the position that the jurisdictional requirement of pre-payment does not "crystallize" until the taxing authority moves to dismiss. *Schneider* v. *City of East Orange,* 196 N.J. Super. 587, 593-94, 483 A.2d 839, 842 (App. Div. 1984), aff'd o.b. 10— N.J. ——, —— A.2d —— (1986). Hence, an action challenging an assessment may be heard, but must be abrogated, if a motion to dismiss is made.

In this case, the county board denied respondent City's motion, heard the matter and reduced the assessment by almost $900,000. Respondent City then challenged this final judgment in the state tax court. Petitioner then counterclaimed for a further reduction. The City then moved to dismiss on the ground that the third quarter of the assessed taxes were unpaid. Petitioner, however, had been paying taxes at the pre-challenge level which was higher than the County Board judgment. Petitioner claimed it was unable to pay at the higher level. It also made allegations that the tax assessor had engaged in arbitrary and capricious conduct.

As *prima facie* evidence, petitioner offered the change in assessment in one year from about $700,000 to $1,500,000 in an area where property values were declining. The tax court granted discovery in a wide variety of areas to determine whether petitioner was indigent. The State courts ultimately dismissed because respondents failed to give the discovery sought. Petitioner, however, had offered evidence to prove that its gross income could not support tax payments and operating expenses.

There is no doubt that the state mechanism involves a federally protected property right. *E.g., Rosewell* v. *LaSalle Nat. Bk.,* 450 U.S. 503 (1981), reh. den. 451 U.S. 1011 (1981). Consequently, the panoply of due process protections evolving from the Fourteenth Amendment must be paid due deference. *E.g., Board of Regents* v. *Roth,* 408 U.S. 564, 570 (1972). The question is simply one of the protections needed to satisfy the requisites of notice, opportunity for a fair hearing and review. *E.g., Goss* v. *Lopez,* 419 U.S. 565, 573-74 (1975); *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972). Nor may the State diminish the requirement by adverting to its own particular needs.

E.g., Logan v. *Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982).

This Court has established a three pronged test to determine the necessary protections. *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976). First, the private interest affected must be established. Here, a taxpayer is the victim of outrageous governmental action in increasing an assessment to an unpayable level. Permanent deprivation will occur through tax foreclosure sale. Second, the risk of erroneous deprivation and probable value of other alternatives. In this case, the Board of Taxation reduced the assessment, but the tax court reimposed the original one.

An alternate, simple procedure, no where suggested, might have been as easy as posting a surety bond. See generally, *e.g., McLendon* v. *State Dept. Revenue*, 395 So. 2d 71, 72 (Ala. Civ. App. 1980), *cert. den. id.* at 73 (Ala. Sup. Ct. 1981), *Valentine* v. *State*, 403 So. 2d 770, 773 (Ala. Civ. App. 1981); third, the governmental interest involved. 424 U.S. at 335. The basic governmental interest is receiving taxes without frivolous challenges. But, there must be some mechanism that can provide this.

The state tax court's grant of discovery, in spite of the fact that petitioner consented, is no substitute for a procedural stage where ability to pay taxes is an issue. New Jersey simply does not provide any alternative. Indeed, *Schneider* v. *City of East Orange, supra*, establishes the state courts' opinion that the mechanism is adequate. Here, the tax assessment was reduced by 60% by the local Board.

The County Board's decision was of dubious propriety on the jurisdictional question because of *Schneider, supra.*

Clearly, New Jersey does not offer a taxpayer an adequate remedy where a tax assessment cannot be paid. Discovery to the opposing party is no substitute, particularly since here the opponent attempted to fish as a means of delay by seeking discovery into stipulated matters, *i.e.,* that the corporate principals had the ability to pay the taxes. Yet, the Board did reduce the assessment to a payable level. Since the City then invoked the process, it effectively burdened petitioner's exercise of right. *Cf., Blackledge* v. *Perry,* 403 U.S. 417 (1973).

CONCLUSION

For the foregoing reasons, petitioner Evergreen Towers Inc., respectfully prays that this Court issue a writ of certiorari to review the Judgment and Opinion of the Superior Court of New Jersey, Appellate Division.

Respectfully Submitted

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DANIEL LOUIS GROSSMAN
On the Petition

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—March 20, 1986)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2423-84-T7

CITY OF EAST ORANGE,

Plaintiff-Respondent,

v.

EVERGREEN TOWERS, INC.,

Defendant-Appellant.

Argued: January 13, 1986—Decided: March 20, 1986.

Before Judges Furman, Cohen and Ashbey.

On appeal from the Tax Court of New Jersey.

Gary L. Falkin argued the cause for appellant (Franzblau, Falkin & Goldman, attorneys; S. M. Chris Franzblau of counsel and on the brief).

Robert F. Giancaterino argued the cause for respondent, City of East Orange (Skoloff and Wolfe, attorneys; Mr. Giancaterino on the brief).

Appendix A

Harry Haushalter argued the cause for intervenor-respondent, Attorney General of New Jersey (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Mr. Haushalter on the brief).

PER CURIAM

Defendant property owner appeals the order of the Tax Court reversing the judgment of the Essex County Board of Taxation in defendant's favor. The basis of the Tax Court's dismissal was that defendant failed to pay the amount of disputed taxes required by N.J.S.A. 54:3-27 as a prerequisite to defendant's appeal. We affirm.

N.J.S.A. 54:3-27 provides

> A taxpayer who shall file an appeal from an assessment against him shall pay to the collector of the taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request a reduction in excess of one quarter of the taxes assessed for the full year. The collector shall accept such amount, when tendered, give a receipt therefor and credit the taxpayer therewith, and the taxpayer shall have the benefit of the same rate of discount on the amount paid as he would have on the whole amount.

This section of the law is a limitation on the taxpayer's remedy which is provided by N.J.S.A. 54:3-21.

Appendix A

> A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, may, on or before August 15, appeal to the county board of taxation by filing with it a petition of appeal; provided, however, that any such taxpayer or taxing district may, on or before August 15, file a petition of appeal directly with the tax court, if the assessed valuation of the property subject to the appeal exceeds $750,000.00.
>
> . . .

Defendant corporation owns an office building located in the City of East Orange. Plaintiff is the municipality. Plaintiff's tax assessor assessed defendant's property for the 1980 tax year at $1,500,000. Defendant filed a petition of appeal with the Essex County Board of Taxation (Board) seeking a reduction. The Board entered a judgment reducing the assessment to $604,700.

The procedure which followed is relevant to this appeal. At the time of the Board's judgment defendant had not fully paid three quarters of its 1980 taxes. Plaintiff's motion for dismissal on this ground was denied by the Board. Plaintiff filed complaint with the Tax Court. Defendant counterclaimed, seeking further reduction. Plaintiff moved before the Tax Court for summary disposition on the ground that defendant had failed to pay the required taxes. This motion was granted by order dated September 9, 1983.

Appendix A

Defendant moved for a rehearing. The record is sparse as to the court's reasoning, but in the order granting that motion, the court implied that if defendant could substantiate its claim of being unable to advance the tax, a due process issue would be raised if defendant were denied an opportunity to show the assessment was arbitrary by the strict application of N.J.S.A. 54:3-27. The order limited defendant to a hearing on "the question of what the original assessment was for any of the years relevant to this proceeding and to facts constituting constitutional aspects of a financial[ly] burdensome assessment." The Attorney General was permitted to intervene on the question of the constitutionality of N.J.S.A. 54:3-27. Part of this order provided that "[p]laintiff may engage in discovery to determine the facts supporting the allegation of a financially burdensome assessment."

By order dated March 7, 1984, the court suppressed defendant's defenses and struck defendant's answer and counterclaim because defendant refused to comply with plaintiff's discovery request. By order dated August 2, 1984 the court restored the case to the active list and ordered defendant to provide discovery by August 13, 1984. After much delay the case was called for hearing on November 27, 1984 but upon plaintiff's motion the third motion of dismissal was granted. The judgment under appeal was then entered, reinstating the original 1980 assessment of the subject property.

On this appeal defendant contends N.J.S.A. 54:3-27 denies it due process if construed to mean that a taxpayer may be deprived of a hearing challenging an arbitrary and unconscionable assessment unless the taxpayer advances the disputed tax. In factual support of its con-

tention as to the unconscionability of the assessment, defendant relies upon its capitalization of income statement.[1] In support of its claim as to the arbitrariness of the assessment, defendant avers that the State Division of Tax Appeals reduced the 1977 building assessment from $1,333,800 to $592,100. Defendant further suggests that the determination of the Board, reducing the 1980 assessment on the building from $1,316,300 to $421,000 is a finding by the Board that the 1980 original assessment was "confiscatory". Defendant presented a certification attached to his motion for a rehearing that the assessor had admitted improper motives in making the assessment in question.[2]

In its briefs defendant does not deny that it failed to comply with the following December 1983 discovery requests for the production of the following corporate documents for the years 1978 through 1981:

> 1. Copy of federal and state income tax returns.
>
> 3. Copy of any application for loan or line of credit made by defendant, including documents.
>
> 4. Copy of any and all accounting statements of financial statements of defendant.
>
> 6. Copy of bank books and checking account books maintained by defendant.

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[1] No other supporting corporate document is part of this record. *See infra* for a discussion of the corporate documentation required by court order and never supplied.

[2] We do not here detail the certification to the contrary put forth by the assessor.

Appendix A

7. Copy of any document reflecting accounts and amount of money maintained therein by any investment advisor or brokerage house of defendant.

9. Copy of all the documents submitted in support of application for mortgage on the property.

Instead, defendant focuses upon that part of the notice for the production of documents which demanded similar financial information for the individual shareholders of defendant corporation. The record reveals that by order dated August 2, 1984, defendant received the following protective order at its request as to documents concerning the individual shareholders:

> 2. Defendant's motion for a protective order regarding the Supplemental Interrogatories is denied to the extent that defendant is required to answer Supplemental Interrogatories 3, 5 and 7 in that if the shareholders had sufficient funds or where withal [sic] to pay the taxes necessary to give jurisdiction to the Essex County Board of Taxation under N.J.S.A. 54:3-27 then the answer will so state without further detail but that if the defendant answers the above Supplemental interrogatories to the effect that the shareholders did not have sufficient funds or where withal [sic] to pay the above described necessary taxes then the court will determine in more detail which aspects of the above described Supplemental Interrogatories 3, 5 and 7 must be answered.

The order of August 1984 further required defendant to supply 1978 income and expense statements and balance sheets from the 1978, 1979 and 1980 corporate tax returns.

Appendix A

At the November 1984 hearing defendant corporation conceded it had not complied with any order to provide corporate financial information. Thus it appeared to the trial court that defendant had failed to provide discovery despite repeated leniency, and failed to comply with the court's order of August 2, 1984. Further, defendant had failed to pay any real estate taxes since its insufficient payment in 1980. Pursuant to R. 4:23-2(b)(3); R. 4:23-4, the Tax Court dismissed defendant's counterclaim.

Defendant's position is that due process requires the court to hold a hearing upon defendant's claim that an assessment was arbitrary regardless of whether the taxpayer complies with N.J.S.A. 54:3-27. Defendant urges that strict application of N.J.S.A. 54:3-27 is unconstitutional.[3] No case advanced by defendant supports its position.[4]

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[3] Defendant's further ground for appeal urging that the trial court erred in not accepting a stipulation of shareholder ability to pay the tax is inaccurate and meritless in the light of defendant's failure to provide corporate records as required by court order.

[4] Our research discloses no case in which the requirement of payment of taxes under protest has been declared for constitutional reasons. *See County of Maricopa* v. *Chatwin*, 17 Ariz. App. 576, 499 P. 2d (Ariz. Ct. App. 1972) (prepayment constitutionally required under discrimination claim); *Valentine* v. *State*, 403 So. 2d 270 (Ala. App. 1981) (prepayment of tax including penalty and interest jurisdictional and does not raise due process issue); *Horn* v. *O'Chesky*, 378 F.Supp. 1280 (D. N.M. 1974) (court will not enjoin assessment under 42 U.S.C.A. 1983 because state law requires prepayment). There is a case, however, where a required pre-payment (or in this case bond substitute) was waived because taxpayer was indigent and unable to borrow the money. *See Tarbox* v. *Tax Com'n*, 197 Idaho 957, 659 P.2d 342 (1984); and *See Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

Appendix A

It is clear that "equitable administration of the property tax" is required by law and intended by the legislature. (PREAMBLE to P.L. 1967 c. 44, N.J.S.A. 54:1-35.25). If defendant advanced the first three quarters of the tax, the only property of which defendant would have been deprived was the temporary loss of the tax money until the merit of its appeal was adjudicated. N.J.S.A. 54:3-27.2 provides for a refund with interest in the event the taxpayer is successful.

We are satisfied defendant's proffer did not entitle it to a hearing in the absence of compliance with the statute or verifiable evidence defendant was unable to advance the tax. As was stated recently in a comparable case: *Schneider* v. *Cty of East Orange*;[5]

> . . . The critical components of due process are adequate notice, opportunity for a fair hearing an an availability of appropriate review. . . . The statutory procedures available to plaintiffs for the review of their assessments meets these requirements. . . . The interest of the municipality in receiving timely payment of taxes is clearly significant and outweighs any incidental burden imposed upon plaintiffs. . . . It is well settled that a taxpayer may be reqiured to pay the taxes then due as a condition of litigating the amount due.

---

[5] The holding in this case reconciling the difference between the lesser amount of the tax due on appeal to the county board, as opposed to the entire tax due on further appeal to the Tax Court is not at issue here.

Appendix A

[196 N.J. Super. 587, 595-596 (App. Div. 1984) certif. granted, 101 N.J. 229 (1985); citations omitted].

A review of this record further satisfies us defendant's claim of a due process denial is groundless. Defendant was given every opportunity for a hearing to prove that compliance with the statute would be financially burdensome and failed to abide by the requirements of the Rules of Court.

Affirmed.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Petition for Ceritification

(Filed—June 30, 1986)

SUPREME COURT OF NEW JERSEY
C-1068 September Term 1985

25,485

CITY OF EAST ORANGE,

Plaintiff-Respondent,

vs.

EVERGREEN TOWERS, INC.,

Defendant-Petitioner,

and

STATE OF NEW JERSEY,

Intervenor-Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2423-84-T7 having been submitted to this Court, and the Court having considered the same;

Appendix B

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 27th day of June, 1986.

STEPHEN W. TOWNSEND
Clerk of the Supreme Court

APPENDIX C

Certification of James R. Oates

TAX COURT OF NEW JERSEY
Docket No. 07-05166A-81

Civil Action

EVERGREEN TOWERS, INC.,
134 Evergreen Place,

Plaintiff,

vs.

CITY OF EAST ORANGE,

Defendant.

I, James R. Oates, do hereby certify that:

1. I am the Collector of Taxes and Revenue for the City of East Orange and held that position in the tax year and am therefore, familiar with the tax payment records of the City of East Orange.

2. I have reviewed the tax payment records of the City of East Orange with regard to 134 Evergreen Place Block 700, Lot 41 and have made the following determination:

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(a) First three quarters taxes for tax year 1981

Third quarter taxes for 1981 unpaid as of the date of this certification.

(b) Fourth quarter for tax year 1981

Giving due credit for the County Board reduction for the tax year 1980 which resulted in a credit to the taxpayer on the property, there was still a tax delinquency due on the property attributable to taxes due and owing for the tax year 1981 in the amount of $124,770.45 as of December 9, 1981 which I am given to understand is the filing date of the taxpayer's Tax Court complaint.

3. I am making this certification in support of the within motion.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

JAMES R. OATES
Tax Collector

Dated:

APPENDIX D

Transcripts of Recorded Proceedings of October 13, 1983

TAX COURT OF NEW JERSEY

No. 07051650C-80

CITY OF EAST ORANGE,

Plaintiff,

v.

EVERGREEN TOWERS, INC.,

Defendant.

Transcript of Recorded Proceedings

October 13, 1983

BEFORE:

The Honorable Judge Crabtree

APPEARANCES:

Robert Giancaterino, Esquire
Attorney on Behalf of the Plaintiff

Harvey Douglen, Esquire
Attorney on Behalf of the Defendant

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(2)* The Court: All right. Counsel ready on City of East Orange versus Evergreen Tower?

Mr. Giancaterino: Judge, we're here for the City of East Orange. I believe the parties for Evergreen Towers are in the settlement conference room over there. I'll check.

The Court: Would you, please?

Mr. Giancaterino: Yes, We'd like to get this going. Mr. Hartsfield (phonetic and Mr. Oates (phonetic) have a luncheon meeting in the afternoon at noontime.

The Court: Is Mr. Douglen coming?

Mr. Giancaterino: I just notified—yes. He's in the room. He said he's coming.

Judge, the only other thing you have for me is Alstores; right?

The Court: I—yes. I understand we're waiting for your adversary, who's in District Court right now.

Mr. Giancaterino: Oh, okay.

The Court: Okay.

Mr. Giancaterino: The Gearing (phonetic) motion Gearing against Paramus, they called me yesterday and told me they were going to give me the stuff that I wanted, so I agreed to—

The Court: All right. We'll just—we'll continue (3) that then.

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* Figures in parentheses refer to each new page of the Stenographic Transcript.

Mr. Giancaterino: —have you put on,—

The Court: You ready to proceed, Mr. Douglen?

Mr. Douglen: Yes, your Honor.

The Court: All right, sir. All right. For the record then, this is City of East Orange versus Evergreen Tower, a hearing on defendant's motion for rehearing. May we have appearances, please?

Mr. Douglen: Harvey M. Douglen, attorney for the petitioner—

Mr. Giancaterino. Robert—

Mr. Douglen: —plaintiff.

Mr. Giancaterino: Robert F. Giancaterino, from the firm of Skoloff and Wolfe, attorneys for the City of East Orange.

The Court: Whenever you're ready, Mr. Douglen.

Mr. Douglen: Yes, your Honor. I seem—my first—I wanted to call a witness, with the Court's permission, but I want to advise the Court where we—where I stand in this regard. There was previously a hearing on a motion by the City to dismiss the—the appeal—I'm sorry, to dismiss the determination of the County Board for 1980.

The Court: And to reinstate the original assessment. Yes.

(4) Mr. Douglen: Yes. This motion came about as a result of the following. This case, for a lengthy period of time, was in the—on the inactive list. I obviously did not address the file, I doubt that anyone in Skoloff and Wolfe's office addressed their file for—there's no

reason to do so, we did not know when Powder Mill One was going to be decided. Shortly after Powder Mill One was decided, frankly, before I even received a copy—was able to get my hands on a copy of the decision, although I had heard it was decided, a motion was made by the attorney for East Orange for the summary judgment dismissing the determination of the County and reinstating the assessment. In response to that, I appeared with some papers and made certain representations to the Court, which Mr. Giancaterino insisted were scandalous, outrageous, false, unsubstantiated and he was eloquent in his condemnation of myself in making these representations without affidavit. I thereupon—shortly, a few days after that, put some papers together, because now I had some time to do it, whereas upon in response to the motion, it was a little short in time because it came right—right after the Powder Mill case was decided, I put the papers together, making my motion, which was dated September 1st, 1983, asserting certain factual issues for the (5) following reason.

It is my position, your Honor, that the statute which requires payment of the entire amount of taxes based upon the then existing assessment is either unconstitutional facially or unconstitutionally— unconstitutional as applied in this particular case. I submit that a policy —a—a—stated public policy of the State of New Jersey is that courts must apply statutes in such a way as they can be deemed constitutional if it is so possible to read and apply a statute to be constitutional. I submit in this case, if the Court concludes, based on proof of facts, that, notwithstanding the facts in any given instance, the County Board or this trial Court may not grant a judgment unless

the assessment, based upon the—unless the levy, based upon the pre-appeal assessment is paid in full, that that would be an unconstitutional statute, for the following reason. I submit it clearly violates the Fifth Amendment of the United States Constiution as applied because it amounts to a taking of private property without compensation, and let me elaborate.

I'm going, for purposes of my argument, assume the facts which I intend to be able to put on the record, if the Court allows me to present the testimony I need today, and in any event, I'm going to make a proffer of (6) that testimony for purposes of the record. The testimony will be that in 1977, there was an appeal from a County Board determination. Ultimately, it reached the State Division of Taxation and was—came up for trial before Judge Bernard Cutner (phonetic) in the—the Division of Taxation. At that time, a settlement agreement was struck between the taxpayer and Mr. Hartsfield, then assessor, or assistant assessor at that time, if that's what he was, in an amount in excess of $800,000.

Thereafter, Mr. Hartsfield, notwithstanding the agreement, refused to honor same, and it came before Judge Cutner, and he pressed it for trial. The matter came on for trial and judgment was entered in 1977—I'm sorry, it was entered for the year 1977—and we'll present it to evidence, the documents which will show the date that the judgment was signed—reducing the assessment for the year 1977 to $775,000, the assessment.

The testimony will be at—and—and I again, to make the record clear, I'm representing that I have the witnesses here, any representation I'm making, I'm prepared

to put on the record today—the testimony will be that at that time, Mr. Hartsfield told one of the principals that he felt that the judgment was not honestly reached, that it was reached as a result of improper political connections and pressure, and that, as (7) a result of his such feelings, he did not say he would appeal it to a higher court, he said he'd get even with--for the City, and—and—and may well thinking that his job is to protect the City as it is, and he therefore—therefore advised specifically to the taxpayer that he would get even for the City because of what Telzer (phonetic), Harold Telzer, the other principal of this entity did to the City in making this political deal.

Thereafter, in 1978, and 1979, during which period, by law, the—there are to be no reassessment or revaluation, the taxpayer was entitled to a freeze act. And notwithstanding the entry of the freeze act, through the influence of the City tax collector and the City assessor, acting jointly, they just arbitrarily, notwithstanding the judgment, refused to pay the refund due, because the taxes were, in fact, paid for '78—

The Court: (Indiscernible)—

Mr. Douglen: —under the old rate.

The Court: —had a motion, obviously, the judgment in the Division of Tax Appeals was entered some time after the assessing dates for the two freeze years.

Mr. Douglen: Yes.

The Court: Is that correct? Was any motion or any proceedings taken before the Division of Tax Appeals by the taxpayer asking that the freeze act be applied?

(8) Mr. Douglen: Yes. Attached to my affidavit is the order of—of Judge Cutner, signed by Judge Cutner. I frankly don't find a date on it, but it says on it that judgment by virtue of the freeze act should be entered for the year '78. And that's a freeze act judgment for '78, and there was also one for '79. But what I'm—what I'm getting to was, notwithstanding this freeze act judgment for '78, it was not paid, and that taxpayer had instituted a separate suit in the Law Division of the Superior Court of New Jersey, a mandamus (phonetic) proceeding compelling payment. And it wasn't until after the suit was instituted—and I don't remember if there was a judgment, and the testimony will decide, will—will determine what happened—but it wasn't until after the suit was instituted, many months after payment should have been made, that payment was first recovered. And—and I'm—I'm—I'm—I'm—although it's not directly relevant, it's important to show the motive and the codus operandi of the City in regards to this particular taxpayer. So that—

The Court: But notwithstanding those, what you would call obstructions, and Mr. Giancaterino might call delays, but not withstanding those obstructions or delays, however you want to look at it, the judgment was and the refund was, in fact, paid.

(9) Mr. Douglen. Openly. Yes, your Honor.

The Court. Yeah. Okay.

Mr. Douglen: So that—

The Court: For the freeze years.

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Mr. Douglen:—so that for '78 and '79, the effective tax assessment was based upon $775,000, with the—

The Court: Which was the Division of Tax Appeals judgment.

Mr. Douglen: Right, with the then effective rate. Comes 1980, the assessment is increased to $1,500,000.

The Court: Was that the old assessment?

Mr. Douglen: No, your Honor, it was not.

The Court: Okay.

Mr. Douglen: Back as far as 1977—1978, as a matter of fact—I have—because there's some dispute as to what it was—in 1978, I submit that the assessment was 3—$1,390,000, despite the representation to the contrary at the last hearing, and I have as proof of that, the petition of the City of East Orange, signed by Mr. Hartsfield, attempting to appeal that assessment, indicating that, in fact, it was $1,390,000. So that the pre-freeze act assessment of one million three nine was not put back on after the freeze act expired, but a million five was put back on.

(10) As soon as this information became available to the taxpayer, after the—the intial effects of the panic set in, contact was made by numerous people with both the tax assessor and the tax collector, tax collector being Jim Oates, and the tax assessor being Mr. Hartsfield. Contact was made by Mr. Harold Telzer, Mr. Edward Telzer on his behalf, Mr. Abraham Simhoff (phonetic), one of the owner of properties, and Mr. Hal Simmell (phonetic).

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These people are prepared to testify, through one shape or fashion or another, at various times, either two people in the presence of each other, or individually, that the following happened: Mr. Hartsfield made it very clear that he resented what he believed Edward Telzer did to the City of East Orange in 1977, effective for '78, '79, and that he intended to get that money back by increasing the assessment more than the right assessment, but to double up on the payments to get enough money from the money that they last for '77, '78 and '79. And that his motive for doing so not because the freeze act expired, he was just legally able to make a change because the the tax assessor—I'm sorry, that the tax collector also freeze act expired, but it wasn't related to that. That said to one of the witnesses that this is their policy in East Orange, and that, in fact, they already owned all the office buildings in Evergreen (11) Place, and he cited an instance where he did the same thing at 33 Evergreen Place, and the City took over the ownership of the property.

So, based upon these facts, your Honor, I think it's clear it—assuming—now, let—let's say that there is no malicious motive for the time being—but assuming the City had a policy of doing what they ultimately ended up doing, owning all of the property. They have the physical ability, if this statute is strictly construed against the interest of the taxpayer—and—and frankly, your Honor, I think that statute is contrary to the basic common law rights of the petitioner, and therefore should be strictly construed against the statute in favor of the taxpayer—but if it's strictly construed, a town can affirmatively adopt a policy of saying, let's own the real estate.

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Now, we know they really ended up owning the real estate. We don't know that for sure that that was their policy, but, in fact, in this case, they did it, along the whole street. They ended up owning almost all the office buildings, I think, except one. They can very simply say, the assessment in 1977 and '78 was $1,390,000. The taxpayer has got to—and this is also going to be a fact, in '78 and '79 and '80—had 40 percent vacancy in an office building. The going rate (12) was $7, which the assessor knows results in very little left over after operating costs, to pay a mortgage. He's—he's very aware of the facts. He can say, I know they can't pay an assessment on a million five hundred—and, incidentially, the levy on a million five hundred assessment is more than double the levy on the 775, because of the increase in tax rates in 1980. So I know that he can't—he's a corporation, the corporation has no assets other than this one building, I know for a fact, says the assessor, that this building cannot pay its mortgage, and it didn't pay its mortgage, incidentially, 'cause it couldn't, didn't—could not pay its mortgage and pay the taxes and—and maintain the operating expenses. Therefore, something has to give, they will not pay taxes, because the—the—the mortgage is—they foreclose. They dun every month. The oil bill, the oil doesn't come. So, what must give in the system? You defer payment of taxes. And when they fall behind on taxes, they will not be able to pay the taxes, since they can't appeal, because of this statute, which doesn't allow them to appeal until they pay these taxes, and they can't pay the taxes, a Catch-22 system, therefore we'll have a tax certificate, and in six months, after owning the tax certificate, we can foreclose, and, in fact, they

did. They bought the tax (13) certificate on this building, because it has no value to anyone, no one's going to buy it because of what they did with the assessment, and we'll own this building and they did. They started a tax foreclosure on this building.

So what I'm saying is, aside from motive of getting even with Telzer, if they have a policy even of owning the building. I therefore submit that the Court must hear or should hear most respectfully testimony concerning all of these things I alleged, because the Court should have and must have the prerogative of analyzing the effects of the statute as strictly applied in the context of the circumstances. Because the Court has the right to say no, I find that the statute is okay, but it was applied in this case unconstitutionally. Because the law is that a statute must be valid facially and as applied in the particular fact situations to withstand assault.

And in this case, we've got the ultimate telling fact. And it may not be that relevant to the Court, but it bothers me more than anything. We're being thrown out of Court because our taxes weren't paid. But in fact, after the judgment was entered by the County, assessing the property at the proper assessment, the amount of taxes that had been paid to (14) date were sufficient to cover that assessment. I'm sorry. So that equitable and on balance and on a net basis so to speak, in 1980, the amount of taxes paid was enough to be the amount of the assessment, to cover the taxes based upon the reduced assessment. But nevertheless, we're being told we can't have true assessment, we can't have constitutional assessment, we can't have the proper assessment because of the effects of this statute when strictly contrued and strictly applied,

notwithstanding the facts that I allege. And I submit that's not fair.

I submit, therefore, your Honor, that in order to really know if this statute is applied constitutionally in this particular instance or if the City improperly reassessed the property, improperly made use of this statute and is improperly attempting to make use of the statute here. You must hear the facts of statement to be able to support all—to be able to conclude whether what I'm saying is first of all a fact. And if you find it is a fact, then to decide whether or not the statute under the light of those facts is constitutional as applied.

The Court: Mr. Douglen, let me ask you something. Is it your contention and do you propose to show that your client was unable to borrow sufficient funds to (15) pay the balance of taxes due for the year before the County Board?

Mr. Douglen: Yes, your Honor. Actually my testimony will be that the client is a corporation. That the corporation had no assets other than this building and that the assets and the income and expense statement was such that it was absolutely beyond a reasonable doubt clear that they did not have the borrowing power. The stockholders may have individually had borrowing power, but they were unable to obtain a loan, that they had outstanding creditors at the time in a substantial amount and that they were in no position to obtain financing to pay these taxes pending the appeal.

The Court: Is this Court, do you think, required to examine the financing constraints upon each taxpayer

when the—in adjudicating the constitutionality of the statute that requires payment first before litigation?

Mr. Douglen: I think no, your Honor. Frankly I don't think the Court should do that. In normal circumstances absolutely not. In this particular instance, your Honor, I don't think that the Court has to make even a determination as to whether or not Evergreen Towers Inc. had—that's Evergreen Tower (16) Inc. had a borrowing power. I think the Court's inquiry can be limited to the effect that should they—even if they had the borrowing power, should they have had the obligation to exercise that borrowing power, should they have had the obligation to exercise that borrowing power, to call upon it and go through that. Because even if they did, they borrowed money at that time at 21 percent, two over prime at that time and get it back with five percent interest. The question is, should—I think, most respectfully, should they even if they had that borrowing power have been compelled to do so. In this particular case, I think we're held by the fact that it is a corporation. It is a constitutionally mandated entity. They have the same rights in this case as an individual. They have right not to have their property taken without compensation. And in this particular case, it's clear that this is the only asset. Very simple testimony. This is the only asset and it's clear that there is no borrowing power. With a private individual, we may have to go whether he has other assets that would support the borrowing power, does he have an income that would support the borrowing and that would get us off on a tangential issue. In this case, I don't think it's particularly damaging to the Court's time. I don't think a Rule 4 instance exists because it won't take

very much time. No cross- (17) examination can be lengthy when in fact the statement is simply, plain and clear. This is the only asset of the corporation. We had 40 percent vacancies. It was a cash flow—negative cash flow. I mean it doesn't—it doesn't—

The Court: Is it your position, Mr. Douglen then, that in examining the constitutional question that you raised, that the Court may not look to an adjustment at the other end of the proceeding. For example, if the Court were to enforce the statute requiring payment in adavnce of litigation, could we not correct any constitutional deficiencies by adjusting the interest rate on the refund. Notwithstanding that the statute says only five percent.

Mr. Douglen: Only your Honor in a situation where the dollar amount while it may be high is the deminimis in relationship to the entire tax levey. I think in this case and I think that may really be the nexis of the probiem. In this case it is an issue of concern to the Court because that is how, exactly how the City goes about owning the property. It is not necessary because it's economically not feasible for the taxpayer to pay the taxes pending. If that's the issue, I fall in this case. I'm not arguing any issue where it's not economically feasible for the taxpayer to pay the (18) taxes. I'm saying in this particular case, where the City structures it so that they know it's either economically non-feasible or economically impossible for the taxpayer. The taxpayer in this instance, the corporation, without going beyond the taxpayer's assets and borrow—and the borrowing power is the taxpayer's assets, to in fact enter into the litigation.

In other words, the City is saying I have the—I'm alleging the City's saying, I have the ability as the City

to preclude this man from getting his day in Court by the application of this statute. Because I know that number one, Evergreen Towers—Evergreen Tower Inc. does not have the economic wherewithall to get the taxes appealed, to get the income to pay it. And secondly—

The Court: Would you be making this—let me ask you this before—this is very troublesome. Would you be making the same argument here if the original assessment has been restored? You're claiming that the assessment that was imposed following expiration of the freeze year was increased over the pre-litigation assessment. Would you be making that same argument had the original assessment been reimposed? They're only $110,000 apart.

Mr. Douglen: Your Honor—yes, but in this case, (19) your Honor, I would be forced in all candor to make this argument even if they had reinstated the $1,390,000 because they knew that, number one, we're talking about an almost 50 percent—100 percent increase in the assessment, an almost doubling of the assessment. The magnitude of that is very, very substantial, a doubling of the assessment, a more than doubling of the tax levy. In the context of the fact, the assessor had the income and expense statement of this building. In the context of the fact that the assessor is fully aware of the economic conditions on Evergreen Place in East Orange dealing with the other buildings. In context of the fact that the assessor was fully familiar with the tremendous vacancy rate in 1980 on Evergreen Place. He knew exactly what this property owner was faced with. I mean, it wasn't a situation where the true value was in dispute. It wasn't a question what the proper assessment could be. Should it be a million or a million 390. I mean it was no question that there

was nothing about the income flow of this building that would sustain $1,390,000 assessment, let alone a million five. The tax records of the City of East Orange are clear that in these type of buildings, nobody is paying more than 16 or 17 percent of the income flow in taxes and here they're (20) talking about 40 percent of the income flow in taxes I mean it was such a distortion that we just can't accept it on the face and say okay, pay the taxes and litigate later. Because I submitted and they knew that it couldn't be done.

The Court: When was the $1,390,000 assessment made in the first place? Wasn't that part of a district wide revaluation in 1966 or 7 or whatever.

Mr. Giancaterino: Judge, just to clarify, the million 390 was by virtue of a Division of Tax Appeals judgment for the year '76. District wide revaluation was a million 694. The original assessment for 1977 which was the base year with the freeze year judgment in '78 and '79 which they claim is the original assessment for '79 which apparently isn't, was a million 494. Okay. We're talking $6,000 less than the million five that was put on for 1980.

Mr. Douglen: You're—I don't how that could be. The petition of Mr. Hartsfield to the Division of Taxation says that the base assessment for '78 was a million 390. That's what I have in front of me. That's what was attached to the affidavit. The representation is based upon possibly the tax assessment card, that's what they appraised the property record. That's what they appraised it at, but (21) the tax records, the bills themselves don't reflect those numbers.

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The Court: The reason for my question, Mr. Douglen, was assuming that some assessment of this approximate magnitude had been made at the time of the revaluation, it wasn't necessarily so at that time, was it, that taxes took up 40 percent of operating expenses. They may have been—this may have been just a phenomenon that we have seen so often in East Orange in the last few years of a declining office building market and declining rents.

Mr.Douglen: Except that the initial assessment placed on the property at that time was dramatically reduced by judicial fiat subsequent, indicating that there was something wrong, substantially wrong, at that time. We're talking still a couple hundred thousand dollar reduction at that time and we're talking about a very high tax rate in East Orange obviously, so we're talking about a great sum of dollars. But the facts are that the taxpayer for '77, '78 and '79 is paying taxes based upon 775. Conditions were clearly known to be far worse in 1980 than they were in '77, the year upon which the judgment was based. The vacancy rate was far higher. The rent dollars per square foot was not even going up. Costs were up dramatically. We had (22) the effects of the fuel increase at that time, the two big fuel increases, '78 and '80 which was amount to a total tripling in those two years of the fuel which constitutes a very large percentage of the operating expenses of the building. These are not unknown facts to you and I let alone the tax assessor dealing with the individual block and the individual town of which he is the authority. He should on facts anyway if not opinion. So that the importance of the testimony and the background of the application, even the questions that your Honor is asking me indicate that the factual

context of the situation, what the taxes were before or what they went to, must be considered in terms of how this statute is applied. Because if the taxes went back into the assessment number, maybe those facts indicate the statute is constitutional as applied. If it didn't, maybe it indicates it was unconstitutional as applied. So what we're really talking about it even in response to the questions is, now we know the name of the game in effect. It's not just is the statute constitutional or it isn't, but within the context of the factual situation, is is constitutional. And ultimately I'm going to be arguing the final key point is, when the—when the City doubles the assessment and more than doubles the tax rate, irrespective even (23) of what the assessment was before the freeze act, so long as the facts are clear that they knew that that wasn't a valid assessment, that in context of the testimony concerning the motivation, the direct statement of the assessor, I am motivated to double your assessment for a reason and I'm going to do it for a reason other than true value times the ratio. I'm going to do it to get back money which I think we lost. Not that I'm going to appeal the '77 judgment by Judge Cutner. I'm going to get the money back another way, an improper way. And he had a remedy. He could have appealed. Now we're left without a remedy if the statute is to be applied that way. And I submit we have a fact pattern which clearly supports the conclusion that the statute as strictly applied would be unconstitutional and it shouldn't be unconstitutional. Statutes should be constitutional, it should be structured and interpreted and applied in such a fashion if at all possible that it is construed to be constitutional.

I submit that the way that would happen is if the Court says, the statute as written is facially valid, however, the City cannot go ahead and decide for reasons other than valuation, for reasons of motive, that they're going to get even with a taxpayer for money he recovered. And the reason I mention the (24) fact that a lawsuit to get this money back is because it goes to support the conclusions that they just don't want play fair in accordance with the statute and that they're using the statute and I'm sure that there's no way that the legislature, reading the intent of the legislature, they just did not intend that a statute that they wrote could be applied in such a fashion. And I think—we've gone through it at length enough to know, forgetting this fact pattern. I think it's clear that it is possible an arbitrary number of the assessment on your house is $100,000, the assessor doesn't like you, he raises the assessment to $300,000. He knows who can afford to pay those taxes so you're wiped out. He can take your home for the City. Aside from the facts that he did it in this case. We know that there are certain set of facts that that statute could not have been intended to apply strictly. There's just no way that the legislature intended to give the City the power to do what they can do if the Court applies that legislation strictly.

The Court: Aren't you then dealing with what we call a spot assessment?

Mr. Douglen: I think in this case it is a spot assessment, your Honor. And I think in this case there was motivation for the spot assessment. The reason (25) frankly why I am not limiting my argument to spot assess-

ment, but I'm encompassing unconstitutional taking, violation of Article 2 of the New Jersey Constitution, a violation of the Fifth Amendment of the United States Constitution is because of the dispute that exists with regards to what the pre-assessment, pre-1980 assessment was, pre-freeze act assessment was. I have the tax bills. I have the petition. I have the records that were sent to the taxpayer. But I know that they're contending another number. I don't see any basis for supporting it except that they have piece of paper that the tax assessor wrote a number on. Taxes weren't paid at the higher number ever, but they're asserting a higher number. And perhaps the response to the spot assessment argument would be all we did was at the end of the freeze act go back to the pre-freeze act number. Now I have one freeze act number of 1 million 390. Thay have another number. I don't know where they got that number from. It wasn't paid ever at that rate. There's no tax bill at that rate in existence. So I don't know where that number came from. So rather than arguing that limited issue, I include that because spot assessment is a constitutional issue obviously and it amounts in effect to a taking with compensation and that's the reason why (26) we don't permit spot assessing because the assessor, in effect, could take your property by spot assessing. And the reason why we limit it to spot assessing is because that's a clearly defined narrow ascertainable factual pattern. The assessment was one number and you change it to a different number, whereas he didn't change everybody else to that perecentage of value.

In this case, we've got the same evil. An effort to do dirty to one particular taxpayer. We have spot assessing

and we have more than that. We have a motivation to do it and we have numbers which speak for themselves. We have a doubling of the assessment. We have a more than doubling of the tax levy and that's the evil that spot assessing, the general term spot assessing is trying to eliminate. So I think it's clear from the spot assessing cases and from the statute that we're construing, no legislature, I doubt if anyone there who voted contemplated this statute being applied in a fashion by anybody to preclude someone getting a hearing when the taxes are doubled. Even if they're doubled coming off of a freeze act year. Because if the assessment had to be cut in half at some point in time, there's something wrong. And to go back to an assessment twice the Court adjudicated assessment, indicates that there's something wrong.

(27) The Court: Mr. Douglen, what is your view about the apparent non-compliance by the County Board with the regulation that deals with the payment of taxes, three-quarters taxes under 54:2-27 before a case can be heard before the County Board?

Mr. Douglen: I think they did, your Honor, exactly what I think the trial court should do. I think they said look it, we know that this property was previously reduced by a judgment of the Division of Taxation. We know there's been no assessment, we know there's been revaluation and we know that the assessment before was something like $690,000 by a Court, a duly constituted Court of New Jersey under no change of circumstances except maybe a little better than now, found that 690 should have been the assessment. And they put it at a

million 550, a million five. If we apply the statute to read that they could go from $690,000 to a million 500 thousand dollars, that statute got to be unconstitutional. We can't apply that statute in a unconstiuional fashion. They're not a Court. I understand that. But they're normal intelligent human beings that recognize what's going on here and they have the facts in front of them. They knew that in 1979 it was like 690—no, it was $775,000 and now in 1980 the taxes have been (28) more than doubled. So they said let's reach a conclusion to see if something's out of kilter here. And they reached a conclusion as to what they felt the proper assessment was and they found that that proper assessment resulted in all taxes being paid. So it's just a—it's a crazy situation. It's a question of one minute in the point of time. Had they come in with the check at 3:00 and 3:01 the judgment been entered, the check didn't even have their money in the bank. I mean, mechanically we could have gone to the tax collector at 3:00 and he said here's a check for all the taxes. At 3:01 the County Board would have entered that judgment. It would have been a duly proper entered judgment. The next day we would be entitled to that money back with five percent interest. But we didn't have money to lay out. The County isn't going to act in a vacuum either. They're people and they are not going to an insane act. And it was—it was a destructive act to take an assessment, double it and then say no, you can't appeal that unless you can come up with those dollars. And they just didn't want to do it. So they applied—I submit, that they applied that statute properly because it was their job to apply the statute. They had no right to say the statute's unconstitutional.

So they applied it in (29) constitutional fashion. Because to do anything else than they did would result in a conclusion that the statute as applied was unconstitutional.

I have nothing further, your Honor, except the request to be allowed to call the witnesses to support my conclusion.

The Court: I'll hear from your adversary first then, Mr. Douglen.

Mr. Douglen: Thank you Judge.

Mr. Giancaterino: Judge, the original motion in this matter was filed on April 14th, 1982. It was returnable on May 13th, 1982. On April 27th, 1982, Mr. Douglen was substituted and as I recall we discussed the matter, it was placed on the inactive list to consider the motion in light of the Powder Mill case. From that date forward and we did have, we did submit the motion here and Mr. Douglen had the opportunity to submit his arguments at that point and the motion that we had one month ago was to consider your determination and whether the Powder Mill case would change that in light of the law that I had previously argued and submitted by brief in May, in April of 1982. A year and a half ago. Mr. Douglen has never submitted anything up until a few weeks ago in this case. Never submitted a certification, never did a thing. At the (30) hearing on this case which was a month ago, at the rehearing where we were supposed to consider the implications of Powder Mill and whether Powder Mill would change the result, he came up with an entirely new argument without any advance notice to the municipality.

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At that point you will recall that he made various allegations and I argued that they were unsubstantiated. I presented to you the petition to the County Board of 1977 which is the base year in this case which showed that the original assessment as written was a million 494. And he says that that's not the original assessment. Well it was crossed out. The original assessment on there was even higher. So that doesn't really substantiate or help his position.

I also submitted to you the property record card which was admitted into evidence without objection showing that the reval number was 1 million 694. As you will recall, you indicated that you would accept Mr. Dougen's representations that the allegations that he was making were in fact the allegations being made and that they could be supported by certification if necessary. And that on the basis of the evidence that I had submitted, you concluded that all the assessor did was put the assessment essentially back to (31) where it was in the original 1977 level, a million 494.

The question, the problem I have here today is that we've heard every single argument that Mr. Douglen has made substantially one month ago. We heard all of this one month ago. He had the opporunity to present all of this. We have a motion for a rehearing and he must satisfy the requirements of Rule 4:51, Rule 4:50, Rule 4:50-1. He must show a mistake, inadvertance, surprise or excusable neglect or newly discovered evidence. I ask you, has he submitted anything new in the form of other factual allegations other than—different from what he submitted a month ago and I suggest that he has absolutely has not. In that, based on minimal submissions

that I made to your Honor one month ago, you determined that the original assessment should be reinstated and that my motion should be granted.

We're just here today on a rehearing. Now he brings additional witnesses. He's doing it twice. Again trying to surprise the municipality with additional witnesses. Never submitted a certification from those witnesses. I only expected to see Mr. Simhof here and to discuss the matters that were in his certification. I brought two witnesses here and I submitted their certifications. Now it seems to me (32) that what we're getting into, if you're going to consider each and every factual allegation he has made including a trying—a virtual trying of the tax appeal, the valuation, then we should have a pretrial order, we should have depositions, we should have interrogatories, we should have a settlement conference, we should go through the whole business of a trial. Because we're getting further, much further beyond a simple motion here.

And I submit to your Honor that you should rule today that Mr. Douglen is permitted to put on Mr. Simhof and to discuss the matters in the certification in light of the requirements of Rule 4:50-1. That's the first, the problem I really have. And if you are desirous of not ruling that way, then we should set a date for a pretrial conference.

Secondly, for the first time in this case in 1980 we have an allegation of unconstitutionality. I have never heard that word uttered until today. I ask where is Mr. Hauslter. Has he been notified? Obviously not. The Court rules require him to be notified and if they're going to pre-

sent facts and evidence and witnesses seeking to create a factual setting that will attempt to have the statute declared unconstitutional, Mr. Hauslter must be here on behalf of the State of New (33) Jersey to protect the interests of the State of New Jersey which challenges the constitutionality of this statute. And on that basis, if your Honor is even inclined to permit that type of an argument which I submit is not part of this hearing, we should adjourn it and have Mr. Hauslter here. And briefs should be submitted. But I submit he had full oportunity, we had the argument two weeks ago.

Now as to the facts which Mr. Douglen proposes to prove to your Honor, if we get beyond the substantial problems as to the scope of this hearing and the fact that Mr. Hauslter hasn't been notified, you will find out that the 1977 Division of Tax Appeals judgment reducing the assessment to 775 was opposed by Mr. Hartsfield and by the time he had notified Saul Wolf, the time for appeal had run. This was a mix-up of hiring of Saul Wolf at the time he was attempting to get something resolved, that time had run. My file reflects that he didn't have the opportunity to appeal.

You will also note that the assessment of a million 390 was an assessment based on a 1976 Division of Tax Appeals judgment which carried over by virtue of the freeze act through to 1978. There is no doubling of the assessment. It must be clear that there is no doubling of the original assessment. He keeps calling (34) the 1979 assessment that was established by the freeze act, that was established long after the original assessment for 1979 was established, which was a million 390. And that

was only established because of the freeze act in virtue of the 1976 Division of Tax Appeals judgment.

The fact is Mr. Hartsfield has never adjusted any assessment by virtue of vindicativeness or vengefulness. And you will also find out that the 33 Evergreen was never taken over for foreclosure and you will also find out that very few buildings on Evergree Place were taken over for back taxes and that is not the policy of the City of East Orange.

And I submit that the only thing before your Honor is—today is to hear some evidence as to why this case should be reheard. And the only thing I submit that we should discuss is the factual allegation, that is, what was said between the parties, whether it was said that such a thing was intended to be done. And number two, the assessment history of the property.

The fact that there was a refusal to pay the refund, which I don't know whether is true or not, has never been brought up before and it's certainly inappropriate to bring up on the issue of rehearing.

On that basis, your Honor, I think that we should (35) deal with the problem at the scope of this hearing and the problem of how we're going to deal with notification of Mr. Hauslter and the unconstitutionality of the statute. And I submit that that matter is certainly not before your Honor at this juncture of the case.

Mr. Douglen: Your Honor, may I respond just to the procedural issues?

The Court: Yes, of course.

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Mr. Douglen: First of all, with regards to the rule concerning the rehearing, I think first of all we have a mistake. We're alleging that there was a mistake at the original hearing. Counsel keeps insisting that the original assessment was 1 million 490 thousand dollars and his basis for that is the property record card. And he caught me by surprise at the last hearing by insisting that when all I have is the tax bills that say a million 390, Mr. Hartsfield's petition which has a million 390 and he insists up to this very minute that there's—that the pre-freeze act year was a million 490 thousand dollars. And I was certainly surprised at that time and I think he's mistaken. So that allegation in itself complies with the rules which I need to support for my request for a rehearing.

(36) The Court: Let's assume that the Court agrees with you on that argument, Mr. Douglen. How do we cope with the requirement that the Attorney General be notified when the constitutional issue is raised?

Mr. Douglen: Because the Attorney General would have to by law take my position. Because I'm not attacking the facial validity of the statute. I don't want the statute to be declared unconstitutional. I want it to be applied in a constitutional fashion. That's what I've been arguing. The only time the Attorney General has to be named as a party is if the one attacking the statute wants the statute wiped off the books. The Attorney General's interest in the statute is solely expressed and limited to keeping the statute on the books. In this particular case the Attorney General ultimately would have to argue that if the Court feels that there's inequity in any way done because of the existence of that statute, the Court

must by law interpret that statute, if at all possible, in such a way as to find it constitutional. And I agree with him. The Court should interpret that statute to find it constitutional and find it unconstitutional as applied. And that is not within the pervue of the Attorney General because the State of New Jersey is not applying the statute. The Court is (37) applying the statute.

I submit that the Attorney General would not be a proper party to this case and he would be entitled to get out on a motion if I brought him in. He doesn't belong in the case where I'm not attacking the facial validity of a statute.

I further submit, your Honor, counsel says only Mr. Abe Simhof should testify. Why? The affidavit that was submitted by Mr. Simhof upon which he says Mr. Simhof is allowed to testify, says specifically that Hal Simmell told him such and such, that Edward Telzer told him such and such, that Harold Telzer told him such and such and that these conversations took place with the tax collector and the assessor. All these conversations that I alluded to today were mentioned in the certification. So why does he get to choose who I should call for my case? I don't understand the logic behind that Judge.

If in fact we don't need the Attorney General and I submit we don't, there's no reason why we shoudn't proceed today with the witnesses. If the Court feels that counsel is surprised by these witnesses, I'm not trying to pull a fast one on the Court, I'm willing to engage in six months of discovery if they want it. I'm not like the City that says let's proceed on a (38) procedural

handicap basis. We can't be inconsistent. We're arguing that everyone should get their fair and full day in Court. So whatever they want by way of discovery, whatever they want by way of a pretrial order, I have no objection to that. All I'm saying is that I don't think I've done anything which should preclude me from proceeding at this point. I think I've met the threshold necessary to indicate that there should be a rehearing on the basis of his assertions which are factually contrary to the documents that I have in my posession when I came here the last time. I had no reason to expect that he would assert because a property record card says something, therefore that means the assessment was. So I think I met that threshold. I don't think that the AG belongs in this case whatsoever because I think his statute is constitutional if applied properly. And I think there are many such situations where a statute is analyzed to determine how it is applied and I don't want to belabor the point by giving you examples, but I'm sure we can find many statutes which are applied exactly as written in 99 percent of the circumstances and in certain situations, the facts indicated that an injustice would be done, a grave injustice, a gross injustice would be done by applying that particular statute specifically (39) as written and that the manifest clear intention of the legislature is not to do such gross injustice. As a matter of fact, that's a presumption in interpreting legislation. A valid presumption is that the legislature did not intend to do gross injustice by a statute. Therefore the question is how should the statute be applied in this particular case. The County Board of Taxation said it should be applied one way. And the issue before this Court is does

this Court think that in fact they did right and it should be applied that way under the facts in question.

So I'm prepared to concede that they can have more time if they want discovery and all these procedural things he wants, that's okay. But I want the Court to know that we're ready here today with the four witnesses that the Court heard me mention at the last hearing that would testify. The witnesses that are in the affidavit that I submitted on September 1st with my motion, all of which are named. There's no new witnesses here.

Mr. Giancaterino: Judge, you've already ruled in this case that the statute as applied requires a reinstatement of the assessment on the basis of the statute and Mr. Douglen is now asserting that that's unconstitutional. Secondly, the Division of Tax (40) Appeals has issued regulations which require or prohibit the hearing of the case at the County Board level unless the three-quarters taxes are paid. So I don't think there's any question that the constitutionality of the statute as it's been interpreted by the Division of Taxation in its regulations and as you have applied it in this case is under attack. And I don't think it would be appropriate to proceed without Mr. Hauslter being here. The issue of getting prepared for six months, we're prepared to proceed on the basis of the limited scope of what is required or what is permitted to be submitted under Rule 4:50-1. That is mistake. If he says there's a mistake in what the original assessment was for 1977 and he has someone prepared here to submit a tax bill, fine. We'll hear that and then your Honor can make a decision as to whether that mistake requires a rehearing or a recon-

sideration of your determination. But if we're going to talk about whether the tax were 40 percent of the gross income, et cetera, et cetera, et cetera, or whether in fact—I don't even know why we should even get into the discussions between Mr. Hartsfield and Mr. Simhof except that Mr. Hartsfield is here to refute those to substantiate and to protect his own honesty. But the fact is you accepted those (41) contentions as true, as true as the allegations of Mr. Simhof and you rejected them the last time around based on what I'd submitted.

The Court: The Court is satisfied that a sufficient ground has been laid for compliance with Rule 4:50-1 as far as the right to a rehearing is concerned. The Court is concerned that there may be some mistake or surprise with respect to what the original assessment may have been. For that reason I will grant defendant's motion for a rehearing. However, the Court is concerned and we so find that this case requires that notice be given to the Attorney General of the State of New Jersey in that not only is the statute 54:327 be placed in constitutional question notwithstanding Mr. Douglen's very earnest arguments to the contrary, but that the regulation implementing it has also been placed in issue. So for that reason, gentlemen, we will direct defendant to notify the Attorney General in accordance with the rules. At which point, another date will be set for this hearing.

Mr. Douglen: Can I submit an order to that effect, your Honor?

The Court: If you would please, Mr. Douglen.

Mr. Douglen: Thank you very much, your Honor.

Mr. Giancaterino: Your Honor, may I have a ruling (42) as to the scope of this rehearing? Now essentially the way and if I hear you correctly you're now permitting Mr. Douglen to present issues of constitutionality although you've only found that the only issue for rehearing is the original assessment.

The Court: That is precisely what we are concerned with, Mr. Giancaterino, and that is all that we are concerned with. Make that clear.

Mr. Giancaterino: Should I submit an order to that effect?

Mr. Douglen: I think one order might do, your Honor, if your Honor will tell us exactly—

The Court: All right. Gentlemen, the rehearing will be confined to the factual issue of the assessment. At any point in time that's relevant to this proceeding, you may wish to say that there may have been several differences, for all we know, but there's a sufficient doubt in the Court's mind as to what it was. At any particular time, the rehearing will be limited to that issue. The Court will also hear in connection therewith, the Court will hear evidence that either party wishes to proffer dealing with the constitutional aspect of a financially burdensome assessment. It appears to be defendant's position that the—that regardless of any alleged (43) machinations or design, that the assessment was simply so high as to be burdensome and to preclude judicial review by virtue of the requirement of advance payment. The Court will also hear any evidence either one of you gentlemen wishes to submit on that issue. So that leaves us with two issues.

Mr. Douglen: Your Honor, just so it's all on the table and clear, do I understand that the Court will not hear testimony pertaining to the motivations and the reasons for doing those—testimony that I alleged earlier that was available.

The Court: You may submit that, Mr. Douglen, if you feel it is germaine and if the Court believes that it is germaine over Mr. Giancaterino's inevitable objection.

Mr. Giancaterino: Judge, we're—

The Court: To the determination of the constitutional issue.

Mr. Giancaterino: May I just—

The Court: But only to that— in that respect.

Mr. Douglen: So that there's no mistake, I'm really talking about two separate things and I'm by the facial constitutionality and I want to make it clear, I'm really talking about the constitutionality of the ordinance as applied without the intention of seeking (44) the judgment striking that statute. And I want to make that clear so that the Attorney General is aware of what I'm doing.

The Court: We understand that. Very good.

Mr. Giancaterino: Judge, so what you're saying is that we are going to try a tax appeal next time around. We're going to have appraisals—

The Court: No. We're not going to hear any evidence about the operating expense ratios or the vacancy rates or anything else.

Mr. Giancaterino: Well don't I actually need discovery to get financial statements and tax returns as to the

ability of these people to pay the taxes if we're going to get into financial burdensomeness? You know, it seems to me you really opening up Pandora's box here.

Mr. Douglen: I have no obejtcion to that type of information being available. If they want discovery I'll cooperate with them.

The Court: Very good. Plaintiff will be permitted to engage in whatever discovery consistent with the Court rules. Whatever discovery plaintiff feels is appropriate to the constitutional, the financial constitutional issue for lack of a better expression.

(45) Mr. Giancaterino: That issue being the allegation of the defendant—

The Court. That he couldn't pay.

Mr. Giancaterino, He couldn't afford to pay.

The Court: Yeah.

Mr. Giancaterino: Judge, just for the record, we obviously object to that provision. We think that's an irrelevant issue in a case such as this. We think that the—or I think that this is a matter which should be before a Chancery judge and it should have been brought before a Chancery judge in 1980 and it's not proper to bring it up in 1983 when we're dealing with a Tax Court, a court of limited jurisdiction where you've already decided in the Bergen Realty case, that if the County Board of Taxation issued a judgment, the taxes weren't paid as originally levied, and if the taxes weren't paid prior to November 15th or 16th, as the case may be, that the County Board lacked jurisdiction and likewise the Tax

Court lacked jurisdiction. These parties should have taken their complaint if they had any to a Law Division judge or a Chancery judge within 45 days of the accident they were complaining of, which was sometime in 1980 and that's our position with respect to that issue and therefore we object to the entry of an order which will permit evidence to be (46) proffered concerning the financial ability of these particular taxpayers to pay the assessment, especially in light of the fact that—

The Court: The shoe is on the other foot, isn't it? Wouldn't it have been the City's burden then to pursue that remedy? Since the taxpayer won, why should the taxpayer pursue it?

Mr Giancaterino: Well the taxpayer really—when the assessment came down had a complaint. He is saying when the original million five assessment came down, was being arbitrarily treated, was being persecuted, okay. We have a set regulatory statutory procedure for bringing tax appeals. The issues in tax appeals are very limited. We have courts of limited jurisdiction. We get cases tried. We get heard. We get judgments. We have certain requirements as to filing dates, certain requirements as when taxes should be paid so that the financial situation of the municipality runs smoothly. If in fact there is a particular problem, there's a particular allegation that the tax assessor if vindicative, that the tax assessor tripled the assessment, that's something for a Chancery Court to deal with. That's a matter of equitable powers and Mr. Dougien will concede that, because in fact, he cited the West Orange case in which (47) he talks about the equitable powers of the Court. That was a Chancery Court case and that's where they should have gone.

Mr. Douglen: I'm sure Chancery would have sent us to the Tax Court and said we got—you got a remedy. Use your remedy at law, Judge. But it really, I just, if I may, make one comment. You know we have a freeze act statute. It says that if you get a judgment for the next two years absent change in assessment or any little thing or a change in value and if the tax—we get a judgment in 1980 and the town in 1981 says no, I think there's a change in value. I said wait a minute. There's a statute. I'm going to go to Chancery and say—compel him to apply the freeze act. I know what Chancery's going to do. They're going to send—you have a remedy. Go to the Tax Court. Make a motion on the 1980 judgment and get it applied to 1981. In this particular case, I really think that the whole issue is really analogous to this. We've got a statute that says you've got to pay all the taxes. Well I've also got a statute that says I got a freeze act, but they don't want to honor it, so we go litigate. And in this particular case, I don't want to honor the statute because I didn't pay all the taxes. I want to litigate it and say, well, they're going to say under the (48) circumstances the freeze act should not be applied. There's facts and background which indicate under these circumstances, the taxpayer's not entitled to the freeze act. And I'm going to say the same thing. Under the facts and circumstances here, I don't think the City is entitled to the benefits of the statute requiring me to pay all the taxes.

Mr. Giancaterino: Judge, I don't know what the—whether Mr. Douglen is referring hypothetically. But I think it should be clear because I feel that he is misstating the facts of this case and it requires careful analysis on

your part as to what the original assessment was, what freeze act applied. There was no freeze act applicable to the 1980 assessment which is the assessment under consideration here.

Mr. Douglen: No, there wasn't any. I'm talking hypothetically.

The Court: This is why we directed the hearing on the question of the assessment.

Mr. Giancaterino: And the freeze act itself has nothing to do with a Chancery Court. The freeze act itself is self-executing as the Tax Court already held.

The Court: In any event, Mr. Giancaterino, the Court notes your objetcion. It will not change the Court's ruling.

Mr. Giancaterino: Thank you, Judge.

The Court: Thank you gentlemen.

Mr. Douglen: Thank you, Judge.

Mr. Giancaterino: Thank you, Judge.

(Court adjourned).

Appendix D

(50) CERTIFICATE

I, Beatrice A. Creamer, assigned transcriber, do swear that the foregoing is a true and accurate transcript of the proceedings in the matter of the City of East Orange v. Evergreen Towers, Inc., heard in the Tax Court of New Jersey on October 13, 1983.

BEATRICE A. CREAMER
J & J Court Trnascribers

Dated:August 23, 1985

APPENDIX E

Transcript of Recorded Proceedings of November 27, 1984

TAX COURT OF NEW JERSEY

EVERGREEN TOWERS,

Plaintiff,

v.

CITY OF EAST ORANGE,

Defendant.

TRANSCRIPT OF RECORDED PROCEEDINGS

308A Hall of Records
Newark, New Jersey
November 27, 1984
Docket No. 07-50165C-80C

BEFORE:

Honorable John J. Hopkins, J.T.C.

APPEARANCES:

S.M. Chris Franzblau, Esquire
On behalf of the Plaintiff

Robert F. Giancaterino, Esquire
On behalf of the Defendant

Appendix E

(2)* The Court: The City of East Orange versus Evergreen Towers, Docket No. 07-05165C-80C.

For the record, enter your appearances.

Mr. Franzblau: My name is Franzblau, F-r-a-n-z-b-l-a-u, on behalf of Evergreen Towers.

Mr. Giancaterino: Robert F. Giancaterino from the firm of Skoloff & Wolfe for the City of East Orange.

The Court: Mr. Franzblau, are you the attorney of record in this matter?

Mr. Franzblau: Yes, your Honor. I believe I am.

The Court: Wasn't Mr. Raucoff (phonetic spelling) on this?

Mr. Giancaterino: Yes, your Honor.

The Court: Are you from the same firm as Mr. Raucoff?

Mr. Franzblau: No, your Honor, I'm not.

The Court: Have you discussed this matter with Mr. Franzblau?

Mr. Giancaterino: I had discussed the matter with Mr. Falkin last week, your Honor, before the Thanksgiving holiday and I was advised that they were the new attorneys.

The Court: Mr. Falkin?

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* Figures in parentheses refer to each new page of the stenographic transcript.

(3) Mr. Giancaterino: Mr. Falkin from Franzblau and Falkin is the name of the firm.

The Court: Is Mr. Falkin in your firm, Mr. Franzblau?

Mr. Franzblau: Yes, your Honor.

The Court: Then there has been a substitution of attorney in this?

Mr. Giancaterino: I believe I did receive a substitution of attorney. I don't know if one was filed with the court.

The Court: Yes, there's one here. Very well.

This is a motion and a cross-motion. The original motion was to set aside a motion to dismiss which was granted by Judge Crabtree some time ago. That motion was granted on failure to pay taxes, is that correct?

Mr. Giancaterino: Your Honor, the motion was originally brought by the City of East Orange to reinstate the original assessment and to grant the motion to dismiss that was made at the County Board level. Judge Crabtree signed the Order reversing the action of the County Board in failing to dismiss the appeal and reinstate the originial assessment and then dismissing the Tax Court action because, again, the taxes hadn't been paid pursuant to (4) NJSA 54:2-39, wiping the slate clean.

Are you following me so far?

The Court: No. The taxes were not paid?

Mr. Giancaterino: The taxes were not paid.

The Court: That's right.

Mr. Giancaterino: On both levels, at the County Board and the Tax Court level.

Appendix E

The Court Alright.

Mr. Giancaterino: Mr. Dougland (phonetic spelling), who was handling the matter prior to Mr. Raucoff and prior to Mr. Franzblau, made a motion for a rehearing to discuss certain of the facts that had come out in oral argument at the prior hearing which resulted in Judge Crabtree's Order reinstating the assessment. That motion was granted saying that there would be a rehearing, and we are here today essentially to have that rehearing.

The Court: Wasn't that motion granted that the rehearing would be limited to certain—

Mr. Giancaterino: Yes. The Order was signed November 9th, 1983, more than a year ago, and it said that after notice to the Attorney General—I'm reading from paragraph 3:

> "The Court will schedule a hearing to determine certain facts previously presented (5) to the Court in connection with the application of NJSA 54:3-27 to the present controversy and the constitutional sufficiency of same."

Then it says:

> "Said hearing shall be limited to the question of what the original assessment was for any of the years relevant to this proceedings and to facts constituting constitutional aspects of a financially burdensome assessment. No evidence shall be heard regarding the valuation of the property and the Court will not review the merits of the assessment in relation to its actual or potential income and expenses."

That was the Order of November 9th, 1983. There was also a September 9th prior Order in which Judge Crabtree basically said there would be a rehearing. The November 9th Order was a supplementation of that Order.

The Court: Very well. This hearing then is scheduled in accordance with that Order?

Mr. Giancaterino: Well, there was a subsequent Order, your Honor. If I may fill your Honor in on exactly what happened.

That Order also permitted this Plaintiff to (6) engage in discovery, the Order that I just read to you, the November 9th, 1983 Order, by Paragraph 4. "Plaintiff" being the City of East Orange. The Order read specifically:

> "Plaintiff may engage in discovery to determine the facts supporting the allegation of a financially burdensome assessment."

The Court: Isn't that the basic issue that was being presented?

Mr. Giancaterino: Yes, but—

The Court: That there was inability to pay the tax assessed because it was increased over the prior year?

Mr. Giancaterino: I understand that that's what the allegation is. What I am suggesting is that when that allegation was made for purposes of the rehearing, I suggested to Judge Crabtree, well, the City then should have discovery on that to see the books and the records of the taxpayer and whatever, and Judge Crabtree signed

an Order saying that the City would be permitted to have an extended period of discovery on that issue.

The Court: All right.

Mr. Giancaterino: I served interrogatories and request for production of documents in December (7) of 1983, and then in February of 1984 I filed an ex parte application under Rule 4:23 for the striking of the defenses of the Defendant for failure to answer those interrogatories, and that application should be in your file. It was supported by various letters and an affidavit showing that I had discussed the matter numerous times with Mr. Dougland attempting to get him to give me the information.

The Court: Why was it to strike defenses? Why wasn't it directed toward to dismiss the motion?

Mr. Giancaterino: It was essentially, without the defenses being able to be raised by the Defendant, there would be no basis for him to make the motion. That was the theory of the Order that I submitted.

In any event, it doesn't matter because we had a hearing in June, the end of June in 1984 with Mr. Raucoff. I think your Honor will remember in which Mr. Raucoff then moved to set aside the Order striking the Defendant's defenses and for a Protective Order regarding certain aspects of the interrogatories.

If your Honor will recall, the interrogatories that I served not only asked about the financial (8) ability of the corporate owner of the property, and the property was the sole, as I understand it, the sole asset of the corporation, but I also asked for information regarding the financial ability of the three sole shareholders of the corporation.

Your Honor signed an Order then that was dated—this is the last Order in the file. Order dated August 2nd of this year in which you required the Defendant to answer certain interrogatories, specifically to provide me with the income and expense statement and balance sheets from the 1978, 1979 and 1980 tax returns and also that the shareholders would answer with respect to their financial ability to—whether they personally would have the ability to pay the taxes.

As your Honor will recall, you ordered that if they said yes, they had the ability, then there would be no further discovery; but if they said no, they did not, then there would be a reapplication to determine what the scope of my further inquiry would be, given their sensitivity about their personal financial affairs.

You then ordered that the answers be supplied by August 13th, 1984 and your Order said further that the hearing would be set for August 17th, (9) 1984 in accordance with Judge Crabtree's prior Order of November 9th, which was specifically set forth in the Order.

Then we had the rehearing scheduled for September 29th, October 13th and finally we've had it scheduled for today. It's continually been adjourned. Now, this is the point that we're at today on this particular proceeding.

The Court: Mr. Franzblau.

Mr. Franzblau: Yes, your Honor.

The Court: What s your position on this?

Mr. Franzblau: Well, with respect to—

The Court: The hearing this morning, are you ready to—

Mr. Franzblau: I'm perpared to proceed and I prepared a memorandum of law for you.

The Court: Has this been submitted to me?

Mr. Franzblau: No. I was just going to hand it up to you and to counsel, as a matter of fact.

I wanted to outline—I didn't know how you were going to proceed, first of all.

The Court: This is your motion.

Mr. Franzblau: It's your court, your Honor.

The Court: Motion to set aside the—

Mr. Franzblau: I'm prepared to present (10) testimony.

The Court: Well, as I understand it, the motion was made to set aside the judgment. Did Judge Crabtree restrict it to ability to pay or did he leave that open as to the reasons why the motion should be granted?

Mr. Giancaterino: No. He definitely restricted it, your Honor. I just read in detail exactly what the Judge stated. He had basically two aspects of this hearing: number one, just to get the assessment history of the property to determine how the 1980 assessment fits in with prior assessments.

The Court: Yes.

Mr. Giancaterino: Because the allegation is that the assessment was substantially increased. And the City's defense was that the 1980 assessment, which is under appeal, was simply a reflection of the 1977 assessment which was litigated, cut back. There was a freeze for

two years, and then when the freeze expired, the assessor put it back. That was, essentiallly, the City's position.

Judge Crabtree also said that the hearing would be limited to, and I quote, "to facts constituting constitutional aspects of a financially burdensome assessment," and then he put a limit on (11) it. He said, "No evidence will be heard regarding the valuation of the property and the Court will not review the merits of the assessment or the actual or potential income and expenses".

The Court: I wish I had that Order before me here.

Mr. Giancaterino: You have the Novemebr 9th 1983 Order of Judge Crabtree, your Honor? If not, I have the original—or, at least, it's penned copy.

The Court: Do you have it, Mr. Franzblau?

Mr. Franzblau: I'm sorry, your Honor?

The Court: Are you familiar with that Order?

Mr. Franzbalu: Yes, I am. It's my understanding that it is exactly as counsel recites it.

The Court: That would set the parameters of the hearing this morning.

Mr. Franzblau: Yes, absolutely. I would suggest, if I might, your Honor, in accordance with the parameters of the hearing, which I understand to be exactly as counsel outlined it, we prepared a memorandum which is, essentially, our offer of proof as well as the law that we believe to be applicable under the circumstances. I'm sorry to submit it at a late hour such as this, but we did a great deal of (12) research which we think will be helpful to you. It's a short memorandum and I would

respectfully suggest that your Honor, without sounding presumptuous, perhaps your Honor could read it before we commence the taking of testimony.

The Court: Well, I will do that.

Mr. Giancaterino: Your Honor, the problem I have with that is that there is no Court Order permitting the submission of this memorandum. What's being done here is the submission of a memorandum setting forth, I'm not sure, but I expect good counsel would attempt to get the best law in his favor, submit it to your Honor and without the opportunity for the City to present that law.

The Court: It's an offer of proof.

Mr. Giancaterino: Excuse me, your Honor?

The Court: It will be treated as an offer of proof, at the most.

Mr. Giancaterino: Okay. I'm just suggesting that it deprives the City of the fair opportunity to present the law to your Honor to establish what we believe the law is in this case for purposes of the hearing. If there were to be pretrial briefs, then I should have been given the opportunity to write one and submit it.

(13) The Court: This was merely a pretrial brief with his position on it, the same as an opening statement.

I'll keep this here and I'll read that.

I'm going to recess with respect to this case for about ten or fifteen minutes. I'm going to call another case and I'm going to recess to my chambers and then I'm going to come out and hear this case.

Mr. Giancaterino: I have an application in this matter. I don't know if you want to hear it now and then consider it or wait until you come back.

The Court: An application for what?

Mr. Giancaterino: An application to dismiss the motion for rehearing right now based on the failure to comply with the outstanding discovery order which is, essentially, the third aspect of discovery in this matter.

The Court: Make that after I have an opportunity to read the memorandum.

Mr. Giancaterino: Okay.

The Court: So I'll have all the facts in my mind.

Mr. Giancaterino: Very good, your Honor.

The Court: I'll recess and call this matter (14) again probably in twenty minutes.

(Recess.)

The Court: I read your memorandum of law.

Mr. Franzblau: I hope you liked it, Judge.

The Court: And it's really not directed toward the limitation of the hearing this morning.

Mr. Franzblau: Perhaps you and I don't—or perhaps I don't understand the limitation. I thought it was absolutely directed to the limitation.

The Court: The limitation was shown in the Order, which I don't know whether you have a copy of it now or not. It says, "This hearing shall be limited to the question

of what the original assessment was for in any of the years relevant to this proceeding and to facts constituting constitutional aspects of a financial, burdensome assessment."

Mr. Franzblau: That's exactly what I directed the memo to.

The Court: Well, it's my understanding that that was intended to show whether or not you had the ability to pay this tax.

Mr. Franzblau: That the hearing is for that?

The Court: No. Whether you had the ability (15) to pay this tax when it was due.

Mr. Franzblau: You mean in the memorandum?

The Court: No. The issue is whether or not you had the ability to pay this tax when it was due.

Mr. Franzblau: That's the issue—

The Court: This morning. And it was my understanding—

Mr. Franzblau: That's not my understanding.

The Court:—that the limitations—Understand, you are the third attorney representing the taxpayer to appear before me on this matter. At least two. Maybe there was one before you, Mr. Douglen. But the interrogatories that were in controversy before me, for the most part, were directed toward that precise issue, as to what the stockholders had to answer with respect to their financial ability to pay over and above the financial assets of the corporation. That is all directed toward their financial

ability and the corporation's financial ability to pay this tax when it was due, and that is the limitation set on the hearing.

Mr. Franzblau: Well, that's easy, Judge.

The Court: Pardon?

Mr. Franzblau: If that's the question that (16) easy.

The Court: They were able to pay?

Mr. Franzblau: No, they were not able. The corporation had no money and were unable to pay. That isn't the issue, as I understand it. Would your Honor hear me for a moment on that?

The Court: Certainly.

Mr. Franzblau: Your Honor, first of all, the memorandum is directed at the constitutional issues involved in this case. Number one, as to the constitutionality of the statute, and, number two, as to the constitutional application of the statute. The memorandum is specifically directed at that. There is an underlying question, perhaps, with which we take issue; however, the issue that your Honor raises is, did the corporation have the financial ability to pay the tax at the time the tax was imposed or as of the time of the filing of the initial tax appeal which is in question here.

The answer to that is, absolutely, it did not have that ability.

We took exception to the question as to whether or not the stockholders as individuals of the corporation had the ability to borrow money and lend it to the corporation to pay that tax. We say (17) that is not the question, that

that is not a responsibility of stockholders under the circumstances if, in fact, there had been a capricious assessment. That is the underlying issue.

We took issue with the propriety of that interrogatory as to the net worth of the stockholders and/or their ability to borrow and/or lend money to the corporation to pay the burden. That's a different issue or it's one-time removed.

We respectfully suggest, your Honor, that if the corporation did not have the money, and even if the—whether the stockholders had the money or didn't have the money, the corporation did not have to be put into a position to have to pay an arbitrary and capricious tax assessment, notwithstanding.

If your Honor feels that that is the issue, then I would say there is no need to have any further hearing. I would like very much if your Honor would render a decision on that point at this time.

I will stipulate right now for the purposes of this record that the corporation did not have sufficient funds to pay the taxes, but the stockholders as individuals had sufficient monies to (18) lend to the corporation to pay the tax. If you feel that that is the essential element, those are the facts and I will concede that to you now.

In all due respect, and I've never had the opportunity of appearing before you, Judge, and I say this most respectfully, I would invite the Court to decide that issue, the issue on that ground, because, very frankly, I got involved in this case because it's of great intellectual interest to me, frankly. I am very interested in this ques-

tion. I would like to be able to litigate the statute on that basis, and I think it is an appropriate basis with which to deal because my personal opinion is that under these circumstances the statute isn't constitutional from that viewpoint.

The Court: Mr. Giancaterino.

Mr. Giancaterino: Your Honor, I'm not prepared to accept a stipulation, although I was advised by the prior attorney that a stipulation would be signed that the corporation did not have the ability to pay the taxes but the shareholders did. I was advised that a stipulation would be signed that the shareholders had the ability to pay the taxes, and I am prepared to accept that standing alone without any further conditions.

(19) As far as the financial ability of the corporation goes, I served interrogatories directed towards that. Pursuant to Judge Crabtree's Order of November 9th, 1983 I served those interrogatories. They were served in December of 1983. We are almost to December of 1984.

I suppose I'll take the opportunity now to make the application that I advised your Honor of. Because of the long history of delay of this case and because there is an outstanding discovery order that has not been complied with to date and because of the fact that right now there is approximately $975,000 of taxes outstanding on this property, this motion should be forthwith summarily denied.

Judge Crabtree ordered discovery in November of 1983. I served the interrogatories. They were not complied with. I didn't sit back and just wait for the time to run.

Appendix E

I made numerous telephone calls. I saw Mr. Douglen on the street because he was in the same building. I served numerous letters. I tried to resolve the problems that they had with the shareholders' personal problems. Nothing whatsoever was done.

Then I filed the ex parte certification. It was signed by your Honor striking their defenses (20) and, for all intents and purposes, wiping the slate clean.

Out of time, the Defendant's attorney then moved and we finally had a hearing on June 28th for a reinstatement of the matter, a reinstatement of their defenses and for a Protective Order. And then your Honor signed an Order dated August 2nd, 1984, virtually three-quarters of a year after I had served the interrogatories, specifically requiring an answer to supplemental interrogatories regarding the shareholders. That's in Paragraph 2. But, importantly, in Paragraph 3, Defendant will supply 1978 income and expense statements and balance sheets from the 1978, 1979 and 1980 tax returns.

To date, that Order has not been complied with. That Order has been flaunted. That Order has been ignored. There is a Court Order outstanding and the Defendant come here today to trial hoping to go ahead without giving the City the discovery that it needs.

The only solution to the matter is to dismiss it now. I advise Mr.—

The Court: Did you file a Notice of Motion on this?

Mr. Giancaterino: With respect to which, your (21) Honor?

Appendix E

The Court: With respect to failure to answer these interrogatories and the specific ones that were not answered?

Mr. Giancaterino: I already had the case— the interrogatories—based on the failure to answer interrogatories under Rule 423, I had submitted an ex parte application. It was dismissed, the defenses were stricken. Your Honor then heard the Defendant's motion to reinstate.

The Court: I'm talking about the interrogatories that had been submitted within the last several months.

Mr. Giancaterino: Yes. We argued each and every one and the propriety of them before your Honor on June 28th because the Defendant had moved again out of time to reinstate again out of time. Instead of objecting to the interrogatories, they moved then before your Honor on the cross-motion for a Protective Order at that late date. We discussed it at length and the bottom line was that your Honor entered the Order of August 2nd requiring the things to be answered.

Mr. Falkin called me last week after—I had spoken to Mr. Raucoff many times and said we still (22) have the outstanding discovery order, where is it, I can't go ahead with this hearing until I have the stuff. When Mr. Raucoff originally came to your Honor and got the date that we have today before your Honor, I had spoken with him. He represented to you that I had spoken with him. I said to him, "How can I go ahead? I'm going to make a motion to dismiss because you still haven't answered the discovery that the Judge required in his Order to be answered by August 13th, 1984." I advised him then.

Then the case was transferred over to Mr. Falkin's office. He called me last week. I advised him again, I said, "How can we go ahead? You don't have the answers. You haven't given me the answers. You better get them to me." No response, nothing. I haven't gotten anything and I show up here today. Now the Defendants are ready to go ahead and make their case without giving me the information that I need.

The only solution is for a dismissal. I prepared for this case twice. I spent virtually the entire day yesterday prepping my witnesses for the second time. Again I show up and, again, the information hasn't been supplied.

The only sanction in this case, your Honor, is (23) to dismiss it. Let them take it to the Appellate Division, let them make their arguments there.

The fact is, under the current state of the law, the Supreme Court has now decided that the payment of taxes is such an unmeritorious issue that they've dismissed the appeal from Woodlake Heights summarily. I think that is the final word on it. The issue of payment of taxes, I think, has finally been decided by the Supreme Court.

So at this date, whatever arguments can be made are going to be superfluous and I think they should take their matter to the Appellate Division now.

We've had a final Order outstanding for more than a year dismissing their appeal and reinstating the original assessment. They've been essentially buying time by continuing to proceed and continuing not to comply with the Court Orders. I have a Court Order of August 2nd.

Appendix E

I'm making an application now to dismiss and to deny the motion and to have this matter finally concluded, and I still don't have the information that I need.

The Court: Mr. Franzblau, do you have anything to offer with respect to this.

Mr. Franzblau: There's never been a motion to (24) dismiss, as far as I know. We're here under your Order that we have a hearing on the narrow constitutional issue as to whether or not this was a capricious tax assessment.

It is our position, your Honor, that the—after the Tax Board found a $421,000 assessment and that the Tax Assessor refused to apply the Freeze Act and turned immediately around after making certain remarks about what he was going to do because of his personal vengence against Harold Telzer (phonetic spelling) and then jacked the assessment of $1,500,000 without any reason other than to drive Telzer out of town, that—suppose he would have raised that assessment to $15,000,000 or $150,000,000, does that mean the clients have to put up the tax or lose the property?

We are entitled to be heard on that as to whether or not the statute—whether it's constiutional on its face or not, is applied on constitutional—

The Court: Did you answer the interrogatories or not, that's what I'm asking?

Mr. Franzblau: First of all, I don't think they're relevant to that issue. Is your question to me, have they been answered? The answer is no.

(25) The Court: Have any taxes at all been paid, for the record, for the year 1980?

Mr. Franzblau: Your Honor, may I say this? In all due respect, I would have to object even to the Court's asking that question. Because, as I understood the Court's own Order that this hearing was limited to certain constitutional issues and that not being the payment or non-payment of the tax. Now, if your Honor asks that question, of course, you'll be entitled to an answer. Undoubtedly, what would prompt that question is for you to know whether they were paid or not, which wouldn't be relevant to this issue, but would, undoubtedly, have some affect on your judgment.

The Court: The Court wants its question answered. Your objection is noted and overruled.

Mr. Giancaterino: Okay. Your Honor, the answer to the question is that for 1980 my records show, and Mr. Oats (phonetic spelling), the Tax Collector is here prepared to confirm that, that approximately $57,000—

The Court: How much?

Mr. Giancaterino: I'm sorry. Approximately $57,700 were paid in 1980 and no taxes were paid after that.

(26) The Court: What was the assessment?

Mr. Giancaterino: A million five. The first three-quarters would have been $90,300.

Mr. Franzblau: On the basis of a million—

Mr. Giancaterino: Your Honor, certain comments to what counsel has stated. Your Honor was not privy to

the original hearing before Judge Crabtree in which Mr. Dougland made certain representations about the jacking up of assessment and the motivation of the Assessor and so forth and so on. At that hearing I submitted certain documents to Judge Crabtree that were marked in evidence, specifically, the property record card showing that the 1974 assessment was adjusted to a million six nine four. And on the basis of that, Judge Crabtree essentially decided that he was not going to hear anything else about assessments being jacked up. That's why he entered the lengthy Order.

The Court: That will be part of the record. I'm sure.

Mr. Giancaterino: Yes, but I'm just trying to explain that because I think the record should be clear now.

The Court: Do you have anything else to say?

(27) Mr. Franzblau: No, your Honor.

The Court: The hearing was scheduled this morning for the purpose of determining whether the increase of assessment was such as to impose such a financial burden on the taxpayer that the required payment prior to a determination on the merits violated its rights. Toward that end, limited discovery was permitted. Restrictions placed on that discovery was to determine both the financial ability of the major stockholders.

Those interrogatories have not been answered.

A motion has been made to dismiss for failure to supply answers to interrogatories. Acknowledgement has been made that they were not answered.

The motion is granted.

Appendix E

The motion dismissing the motion for reconsideration is granted.

Submit an appropriate Order to that effect.

Mr. Franzblau: Your Honor, would you hear just our offers of proof or would you make our memorandum of law—or would you mark our memorandum of law then as an offer of proof for identification?

(28) The Court: Do you wish to be head on that?

Mr. Giancaterino: Your Honor, if it's just an offer of proof as to what the Defendant would be offering in terms of testimony, I think most of that is probably contained in an affidavit perviously submitted by Mr. Simhoff (phonetic spelling), which is already part of the record. But just an offer of proof without an entry of it, I don't think there's any problem with that.

The Court: As an offer of proof, it will be received and placed in the record.

Mr. Franzblau: As P-1 for identification?

Mr. Giancaterino: It would be D-1, I think, because you're the Defendant.

Mr. Franzblau: Or D-1 for identification.

The Court: D-1 for identification. Yes. Have the Clerk staple the two documents together and marked, Mr. Franzblau.

Mr. Franzblau: I invite the Court's attention to the memorandum that I submitted—

The Court: An Opinion. Attached is an Opinion?

The Court: Pardon?

Mr. Franzblau: Is an Opinion and several Tax Court judgments and tax appeal judgments,

The Court: I haven't verified those, but (29) I will assume they're being—as an offer of proof and they will be treated the same way.

Mr. Franzblau: Yes, but it will all be marked as D-1 for identification?

The Court: Marked as one. It will be stapled together and marked as a Defendant's Exhibit for purposes of an offer of proof.

Mr. Franzblau: Thank you, your Honor.

The Court: Anything other than that?

Mr. Franzblau: No, your Honor.

The Court: Very well. Submit an appropriate Order. The five-day rule.

Mr. Giancaterino: Yes, sir.

The Court: Thank you both.

Mr. Giancaterino: Yes, your Honor.

Mr. Franzblau: Thank you.

The Court: You better not take that. That's part of the record here now.

Mr. Franzblau: It's only for identification, your Honor.

Mr. Franzblau: It's not in evidence. It's only a document for identification.

The Court: Well, I want to have it in the record, my record. If you wish, you may sign for (30) it and make a copy and sent a copy to the Court.

Mr. Franzblau: Could we do this, your Honor? Could we mark two copies so that you could have one and I will have one? I have another exact copy with me.

The Court: You may mark yours "copy" and have the other marked and we'll take it that way.

Mr. Franzblau: I'm sorry?

The Court: So that the original offer of proof is in the record.

Thank you.

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(31) CERTIFICATE

I, Joyce Tarcza, of J & J Court Transcribers, do swear that the foregoing is a true and accurate transcript of the proceedings in the matter of Evergreen Towers v. East Orange, heard in the Tax Court of New Jersey on November 27, 1984 and recorded on Tape No. 1, 0003 to 0390 and 0642 to 1217 of that court.

JOYCE TARCZA
J. & J. Court Transcribers

Date: December 18, 1984

Supreme Court, U.S.
FILED
OCT 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-518

In The
Supreme Court of the United States
October Term, 1986

EVERGREEN TOWERS, INC.,
Petitioner,

vs.

CITY OF EAST ORANGE and
STATE OF NEW JERSEY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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POINT I. NEW JERSEY'S STATUTORY SCHEME REQUIRING THAT ALL TAXPAYERS BE CURRENT TO THE EXTENT OF THREE QUARTERS OF REAL PROPERTY TAXES DUE AS A CONDITION TO PROCEEDING WITH REAL PROPERTY TAX LITIGATION COMPORTS WITH FEDERAL DUE PROCESS REQUIREMENTS. 6

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COUNTERSTATEMENT OF THE CASE

INTRODUCTION

Petitioner files this application solely for delay. Petitioner has not paid one single dollar of real property taxes since part payment in 1980. (P7a) Final resolution of this matter was and has been interminably delayed as a result of numerous continuances, motion for rehearing, and delays in discovery, while petitioner continued to operate the building and collect rents from various tenants.

The only legitimate legal issue raised in this case is a facial attack on the New Jersey statutory scheme which requires taxpayers who desire to litigate their real property tax assessments to continue to pay their current tax liability as a condition of continuing the litigation, obtaining a refund with interest if they are eventually successful.

Petitioner's claim that it was unable to pay three-quarters of the real property taxes assessed for the tax year 1980 as a condition to obtaining tax assessment relief from the Essex County Board of Taxation is a complete and unconscionable sham. Petitioner was given the opportunity for an evidentiary hearing on this claim preceded by required discovery. It specifically failed and refused to comply with legitimate discovery demands, despite a court order requiring compliance, ultimately resulting in a denial of its motion for reconsideration. Moreover, petitioner's own factual allegations, which never became part of the trial court's record, demonstrate that petitioner did in fact have the ability to pay the disputed real property taxes.

Petitioner, by its actions herein, has effectively removed its 9-story office building from the real property

tax rolls for over five years. This is an excellent example of the reasons why the New Jersey State legislature enacted additional methods to enforce real property tax payments during a dispute over the tax assessments by relegating litigating taxpayers to refund suits. Petitioner's attack on this type of statutory method has long since been rejected by this Court.

—o—

COUNTERSTATEMENT OF PROCEDURAL HISTORY

The original assessment imposed on the property pursuant to a 1974 municipal-wide revaluation was 1.64 million dollars. (P37a)

In 1977, the property was assessed at $1,494,700 (not including a separately assessed parking lot, assessed at $22,800 which was consolidated in the 1980 assessment). (P37a) That assessment was reduced after litigation before the New Jersey Division of Tax Appeals, the forerunner to the Tax Court of New Jersey.

The 1978 and 1979 assessments were $1,412,800 (including the separately assessed parking lot) or $1,390,000 (excluding the separately assessed parking lot). (P39a-40a) These assessments were reduced by the automatic application of the New Jersey Freeze Act, *N.J.S.A.* 54:2-43 (now *N.J.S.A.* 51A:1-8) to the level established in the 1977 trial judgment.

In 1980, the New Jersey Freeze Act, by its terms, was no longer applicable and the tax assessor established an independent assessment of 1,500,000 dollars consistent with the assessment history of the subject property.

Petitioner filed an appeal to the Essex County Board of Taxation. Even though its three principals admittedly had the ability to advance the three quarters of the taxes due, (P7a, P66a), and even though available evidence indicated that petitioner itself had the ability to pay three-quarters of the property taxes due, it failed and refused to pay those taxes. Accordingly, respondent moved before the Essex County Board of Taxation to dismiss the appeal. The Essex County Board of Taxation, apparently recognizing the validity of respondent's position, granted a grace period for payment of the taxes. Inexplicably, the next action in the matter was the issuance of an Essex County Board of Taxation judgment reducing the property tax assessment.

Respondent sought review before the Tax Court of New Jersey. Petitioner continued to fail and refuse to pay the property taxes due.

At the trial level, the matter was subject to interminable delay. On or about April 14, 1982, respondent moved for summary judgment. On August 11, 1983, the trial judge granted the relief sought by respondent. On October 13, 1983, (Order dated November 9, 1983), the trial judge permitted a rehearing on condition that petitioner provide all relevant discovery regarding its claimed inability to pay the taxes. Petitioner failed to comply with discovery and its defenses were stricken on March 7, 1984. Petitioner's defenses were reinstated on condition that it answer several of the interrogatories, on August 2, 1984. Petitioner appeared on November 27, 1984, before the trial judge having failed to answer those interrogatories and its application for rehearing was finally denied.

The Superior Court of New Jersey, Appellate Division, has affirmed (P1a) The Supreme Court of New Jersey has denied petitioner's petition for certification. (P10a) Petitioner's writ of certiorari in the form of a brief, was filed and served on or after September 25, 1986.

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COUNTERSTATEMENT OF FACTUAL BACKGROUND

Many of petitioner's factual allegations are incomplete, incorrect, or misleading. None are supported by any competent evidence established at an evidentiary hearing because petitioner sabotaged any effort to create a competent record by blatantly refusing to engage in legitimate discovery. This self-inflicted failure now permits petitioner to make wild and unsubstantiated allegations.

Petitioner's recitation of assessments is irrelevant and incomplete. Petitioner refers only to the building assessment and not the land assessment. In New Jersey, total assessments must be divided into land and building. (*N.J.S.A.* 54:4-26). With respect to improved property, having both a land and improvement assessment, the land assessments are customarily left untouched and reductions are assessed against the improvement assessment for purposes of maintaining land assessment uniformity. Therefore, without a comparison of the total assessments, a comparison of building assessments is a clever, but misleading, technique.

Petitioner's claims as to its net income for 1980 is not only irrelevant but is offensive in light of petitioner's refusal to subject these claims to discovery and cross-

examination at trial. Petitioner refused to produce actual accounting documents such as financial statements, books and ledgers or income tax returns, as ordered by the trial judge, which might have substantiated these claims. (P5a-6a) Moreover, the issue, even as raised by petitioner, focuses on petitioner's ability to pay the taxes during late 1980. The alleged net income for one year provides no information as to reserves for taxes, ability to borrow the funds, equity in the property or past history of net income. Petitioner also refused to provide discovery on any of these issues. (P5a-6a)

Further, even petitioner's own figures (incompetent and unsubstantiated as they are) give the lie to its assertion of indigency. In order to preserve jurisdiction in the Essex County Board of Taxation, the property owner was required to pay approximately $35,000 in addition to the approximate $57,000 already paid in satisfaction of the first three quarters' real estate taxes (three-quarters of $123,000). Even on the basis of petitioner's own fictitious figures, this amount could easily have been paid. Certainly and admittedly, the principals of the corporation could have guaranteed any loans to pay this amount. (P66a) No plausible explanation for petitioner's failure to pay the real property taxes was ever offered in this case.

———o———

SUMMARY OF ARGUMENT

1. Petitioner's due process claim must be rejected because the New Jersey statutory scheme implements the "pay now, litigate later" principle, long approved by this Court in the field of real property taxation. Taxpayers are provided full refunds with interest if they are successful, thereby satisfying Federal Constitutional requirements.

2. Petitioner's claim of inability to pay the tax is an unconscionable diversionary tactic as petitioner refused to subject that claim to the rigors of discovery and cross-examination preferring to assert unauthenticated and unsubstantiated figures.

———o———

LEGAL ARGUMENT

POINT I.

NEW JERSEY'S STATUTORY SCHEME REQUIRING THAT ALL TAXPAYERS BE CURRENT TO THE EXTENT OF THREE QUARTERS OF REAL PROPERTY TAXES DUE AS A CONDITION TO PROCEEDING WITH REAL PROPERTY TAX LITIGATION COMPORTS WITH FEDERAL DUE PROCESS REQUIREMENTS.

N.J.S.A. 54:4-66 requires all real property taxpayers in New Jersey to make quarterly payments of taxes. (February 1, May, 1, August 1, and November 1). This statute is applicable to all taxpayers whether they file tax appeals or not. *N.J.S.A.* 54:3-27 further provides that a taxpayer may not be delinquent in payment of its first three quar-

ters taxes if it desires to pursue real property tax assessment reduction before the county boards of taxation. The statute does not impose "prepayment" but only that the taxpayer remain current in its payments otherwise normally due. The statute does not impose currency in payment as a condition to *filing* the appeal but merely as a condition to *hearing and relief*. The taxpayer may be granted an extension of time in which to pay the taxes up until the last day that the county board of taxation has jurisdiction over the matter. *New Jersey Administrative Code*, § 18: 12A-1.6(d); *Verden Realty Mgmt. Co. v. City of East Orange*, 5 *N.J. Tax* 637 (Tax Ct. 1983). If the municipality fails to move before the county board of taxation to enforce *N.J.S.A.* 54:3-27, its rights thereunder may be waived. See *LeCross Assoc. v. City Partners*, 168 *N.J. Super.* 96, 401 *A.*2d 1099 (App. Div. 1979) certif. den. 81 *N.J.* 294, 405 *A.*2d 838 (1979).

Legislation making tax payment a prerequisite to commencing and pursuing tax litigation has been uniformly approved by this Court. *Cheatham v. U.S.*, 92 *U.S.* 85, 89 (1976); *Dodge v. Osborn*, 240 *U.S.* 118, 122 (1969); *Flora v. U.S.*, 357 *U.S.* 63, 68 (1958) aff'd on reh 362 *U.S.* 145 (1960); *Phillips v. Commis. of Internal Revenue* 283 *U.S.* 589, 599 (1931); *Bob Jones Univ. v. Simon*, 416 *U.S.* 725 (1974).

This Court has consistently refused to interfere with a State taxation scheme which relegates a taxpayer to a refund suit, holding that such schemes are generally considered adequate legal remedies within the meaning of the Federal Tax Injunction Act. 28 *U.S.C.* § 1341. *Shelton v. Platt*, 139 *U.S.* 591 (1891) (State statute requiring taxpayer

to pay a license tax and to sue within 30 days after payment or be forever barred); *Matthews v. Rodgers,* 284 *U.S.* 521, 526 (1932); *Great Lakes Dredge & Dock Co. v. Huffman,* 319 *U.S.* 293, 300-301 (1943); *Rosewell v. LaSalle Nat'l Bank,* 450 *U.S.* 503 reh. den. 451 *U.S.* 1011 (1981); *California v. Grace Brethren Church,* 457 *U.S.* 393 (1982).

Rosewell, supra, is particularly relevant as it involved a challenge to a real property tax assessment scheme which relegated a real property taxpayer to refund litigation.

The lower Federal Courts concur. *DePauw Univ. v. Brunk,* 53 *F.*2d 647 (D. Ct. Mo. 1931); *Dist. of Columbia v. Berenter,* 466 *F.*2d 367 (D. Ct. Cir. 1972); *Blackhawk Mining Co., Inc. v. Andrus,* 711 *F.*2d 753 (6th Cir. 1983); *B&M Coal Corp. v. Office of Surface Mining Reclamation & Enforcement,* 699 *F.*2d 381 (7th Cir. 1983).

The New Jersey tax payment requirements expressed at *N.J.S.A.* 54:3-27 are less strict than customary statutes of limitation. This Court has consistently upheld reasonable statutes of limitations and other jurisdictional prerequisites to commencing litigation. *Wheeler v. Jackson,* 137 *U.S.* 245, 258 (1890); *Jones v. Union Guano Co., Inc.,* 264 *U.S.* 171 (1924). In analogous circumstances, this Court has further upheld other types of payment requirements, such as the payment of filing fees, as a condition to instituting litigation. *U.S. v. Kras,* 409 *U.S.* 434 (1973); *Ortwein v. Schwab,* 410 *U.S.* 656 (1973) reh. den. 411 *U.S.* 922 (1973).

The critical governmental interest in receiving timely payment of taxes was recognized by this Court more than a century ago.

> "[T]axes are the lifeblood of government, and their *prompt and certain availability* an imperious need. Time out of mind, therefore the sovereign has resorted to more drastic means of collection." *Bull v. United States,* 295 *U.S.* 247 (1935). (emphasis supplied)

In *Rosewell v. LaSalle Nat'l. Bank,* 450 *U.S.* at 527 (1981), this Court took notice of the recognized fact that real property taxes are the most important source of tax revenues for municipalities. These specific policies underlie *N.J.S.A.* 54:3-27 (See *LeCross Assoc. v. City Partners,* 168 *N.J. Super.* 96, 98-99, 401 *A.*2d 1099, 1100-1101, certif. den. 81 *N.J.* 294 (1979)).

The interests asserted by petitioner are nothing more than the desire to wrongfully withhold tax payments otherwise due the government to use for other purposes. All that petitioner could conceivably be deprived of is interest on its money which is refunded, if petitioner is successful, at a rate of 5%. *N.J.S.A.* 54:3-27.2.

Petitioner's suggested alternative, posting a surety bond, is no different than paying the taxes due. No competent facts indicate that petitioner was unable to satisfy this statute.

In this case, the trial court structured a remedy to address petitioner's claims. It provided for a hearing affording petitioner an opportunity to prove any claim of indigency provable, without requiring petitioner to pay any of the real property taxes due. Petitioner demonstrated its disdain for the opportunities afforded by the trial judge by brazenly and cavalierly failing and refusing to respond to discovery requests that went to the heart of the issue. Thus, as the New Jersey Appellate Division

found, petitioner "was given every opportunity for a hearing to prove that compliance with the statute would be financially burdensome and failed to abide by the requirements of the rules of court." (P9a).

This Court noted in *Boddie v. Connecticut,* 401 *U.S.* 371 (1971) that a litigant's due process rights require only an *opportunity* for a judicial-type hearing and that the opportunity can be lost or waived if the party seeking it "without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication. . ." [at 378].

Here, *N.J.S.A.* 54:3-27 serves an important and legitimate governmental interest and is therefore constitutional on its face. There are no competent facts to continue the inquiry into the statute's constitutionality as applied since petitioner squandered the opportunity afforded by the trial judge to make a legitimate record.

—o—

CONCLUSION

Petitioner's application herein is simply the final step in a long series of delay tactics. As the conclusion of the tax year 1986 is approaching, the property which is the subject of this dispute, a 9-story modern office building, continues to be occupied by commercial tenants, but is failing to produce one single dollar of real property taxes for the municipality. It is therefore respectfully submitted that based upon principles expressed by this Court more than one hundred years ago and the egregious cir-

cumstances of this case, this application must be promptly denied.

Respectfully submitted,

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No. 86-518

In The
Supreme Court of the United States
October Term, 1986

EVERGREEN TOWERS, INC.,

Petitioner,

vs.

CITY OF EAST ORANGE and ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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COUNTERSTATEMENT OF THE CASE

Petitioner, Evergreen Towers, Inc., is seeking, by writ of *certiorari,* to have this Court review a decision by the New Jersey Superior Court, Appellate Division, which the Supreme Court of New Jersey declined to review. Petitioner questions the constitutionality of *N.J.S.A.* 54:3-27 on due process grounds. This statute requires a property owner to pay the first three quarters of the current year's taxes assessed under the New Jersey Local Property Tax, *N.J.S.A.* 54:4-1 *et seq.,* in conjunction with filing a tax appeal with a County Board of Taxation challenging the assessment. A property owner's failure to comply with the payment requirement imposed by *N.J.S.A.* 54:3-27 may result in a dismissal of the appeal. The petitioner maintains that the Appellate Division judgment improperly affirmed the dismissal of its petition of appeal for nonpayment of the taxes in accordance with *N.J.S.A.* 54:3-27 on two primary grounds: first, because the assessment being challenged was allegedly deliberately imposed by the municipal tax assessor at an excessive level and was thus purportedly confiscatory, the assessment should not be the basis for a payment standard related to the prosecution of a tax appeal; second, because the petitioner was financially unable to pay the taxes due, it could not be constitutionally required to pay the taxes as a condition to prosecuting the appeal. This court recently denied *certiorari* in *Schneider v. East Orange*, 103 *N.J.* 115, —*A.*2d — (1986), *cert.* den. — *U.S.* — (1986), involving the constitutionality of the similar payment requirement applicable to tax appeals filed with the Tax Court of New Jersey.

Notwithstanding petitioner's assertion of unconstitutionality, the real basis for the dismissal of its tax appeal

was its unwillingness to comply with certain court-ordered discovery demands relating to the petitioner's financial status. Thus, the actual issue on appeal relates to the reasonableness of the discovery demands, a question clearly involving state law without implicating any federal right.

The petitioner owns property located at 134 Evergreen Place, East Orange, County of Essex, State of New Jersey. The respondents are the municipality of East Orange and the Attorney General of the State of New Jersey. The tax assessor for East Orange assessed petitioner's property for the 1980 tax year at $1,500,000 ($183,700—land, $1,315,300—improvement). Evergreen filed a petition of appeal with the Essex County Board of Taxation seeking a reduction in its property tax assessment. The County Board entered a judgment on November 15, 1980 reducing the assessment to $604,700 ($183,700—land, $421,000—improvement). At the time the County Board entered its judgment, petitioner had not fully paid three quarters of its 1980 taxes. The County Board, however, did not dismiss the petition for nonpayment of the taxes.

East Orange filed a complaint with the Tax Court of New Jersey challenging the County Board judgment and seeking an increase in the assessment. Thereafter, East Orange filed a motion for judgment with the Tax Court seeking reinstatement of the original assessment on the basis that the County Board should have dismissed petitioner's petition for nonpayment of the taxes required by *N.J.S.A.* 54:3-27. The Tax Court entered an order on September 9, 1983 granting East Orange's motion. Consequently, the judgment of the Essex County Board of Taxa-

tion was reversed and the original assessment was reinstated.

Petitioner filed a motion for rehearing on September 1, 1983 with the Tax Court maintaining that the original assessment was grossly in excess of the property's value and it was financially unable to pay the tax. The Tax Court entered an order on November 9, 1983 which granted the motion for rehearing limited,

> . . . to the question of what the original assessment was for any of the years relevant to this proceeding and to facts contributing constitutional aspects of a financially burdensome assessment.

The order also required petitioner to notify the Attorney General of the constitutional challenge to *N.J.S.A.* 54:3-27. The Attorney General was thereafter permitted to intervene as a party solely in defense of *N.J.S.A.* 54:3-27. East Orange moved before the Tax Court to vacate the order for rehearing on the grounds that petitioner failed to answer supplemental interrogatories regarding the financial status of its shareholders. The order was granted by the Tax Court, resulting in the entry of a final judgment reinstating the original assessment of the subject property. Evergreen filed a notice of appeal with the Appellate Division on January 31, 1985 from the whole of the judgment.

The Appellate Division, in a decision dated March 20, 1986, held that the trial court had given petitioner adequate opportunity to advance the position that it was financially unable to pay the tax in accordance with *N.J.S.A.* 54:3-27 and that petitioner's failure to provide relevant information in the context of discovery on said issue warranted a dismissal of its complaint (App. 1A). Petitioner

filed a notice of petition for certification with the Supreme Court of New Jersey seeking to challenge the whole of the Appellate Division judgment. The Supreme Court of New Jersey entered an order on June 27, 1986 denying the petition for certification (App. 10A).

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ARGUMENT

SINCE THIS CASE INVOLVES THE NARROW ISSUE OF THE REASONABLENESS OF THE NEW JERSEY COURTS' DISMISSAL OF PETITIONER'S TAX APPEAL FOR NONCOMPLIANCE WITH CERTAIN DISCOVERY DEMANDS, CLEARLY NO FEDERAL CONSTITUTIONAL ISSUE IS DIRECTLY IMPLICATED SO AS TO WARRANT THE EXTRAORDINARY RELIEF OF GRANTING THE PETITION FOR CERTIORARI.

In accordance with *N.J.S.A.* 54:3-21, a taxpayer or a municipality may file an initial tax appeal with a County Board of Taxation questioning the assessed value of property under the New Jersey Local Property Tax, *N.J.S.A.* 54:4-1 *et seq.* In the event that the assessment being challenged exceeds $750,000, either party may file a direct appeal with the Tax Court of New Jersey, thus bypassing the County Board of Taxation as the initial appeal forum. If the initial appeal is heard at the County Board level, any party dissatisfied with the judgment entered by the County Board may file an appeal with the Tax Court in accordance with *N.J.S.A.* 54:2-39.

The Legislature established certain payment requirements of the current year's taxes related to the filing of

tax appeals with both the County Boards of Taxation and the Tax Court. *N.J.S.A.* 54:3-27 provides that,

> A taxpayer who shall file an appeal from an assessment against him shall pay to the collector of the taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request a reduction in excess of one quarter of the taxes assessed for the full year. The collector shall accept such amount, when tendered, give a receipt therefor and credit the taxpayer therewith, and the taxpayer shall have the benefit of the same rate of discount on the amount paid as he would have on the whole amount.

This statute requires the payment of the first three quarters of the taxes assessed in conjunction with the filing of a tax appeal with a county board of taxation.

With regard to tax appeals filed by taxpayers with the Tax Court, the Legislature required, under *N.J.S.A.* 54:2-39,* that payment of all taxes due must be made at the time of filing a complaint as a condition to perfecting the appeal. This statute provides that:

> Any party who is dissatisfied with the judgment of the county board of taxation upon his appeal may seek review of that judgment in the Tax Court by filing a complaint with the Tax Court, pursuant to rules of court within 45 days of the service of the judgment of the county board, and the Tax Court shall hear and determine all such matters and render its judgment thereon.

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* *N.J.S.A.* 54:2-39 was repealed by *L.* 1983, *c.* 45, effective January 28, 1983. In its place, the Legislature enacted *N.J.S.A.* 54:51A-1, which essentially incorporates the same standards contained in *N.J.S.A.* 54:2-39.

> At the time that a complaint has been filed with the Tax Court, *all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid.* No interest shall be due and payable by the appellant for the period from November 1 of the current tax year to the date of filing the complaint. [Emphasis supplied].

Petitioner contends that the Appellate Division and Tax Court, in reinstating the original assessment and thereby reversing the County Board judgment, so construed *N.J.S.A.* 54:3-27 as to deny petitioner the opportunity to contest the purportedly excessive assessment. Such a result, petitioner maintains, constituted an improper application of *N.J.S.A.* 54:3-27 so as to deny it procedural due process. Petitioner is incorrect in its assertion on both factual and legal grounds. On a factual basis, petitioner was accorded the right to present facts at a hearing as to the unconstitutional application of *N.J.S.A.* 54:3-27, particularly with regard to its inability to pay the allegedly excessive tax. The trial court reversed the County Board judgment because of petitioner's refusal to comply with certain discovery demands relating to such a hearing. Thus, petitioner, because of its noncompliance with discovery demands, consciously determined not to avail itself of a hearing at the Tax Court level. The Appellate Division correctly noted that, "Defendant was given every opportunity for a hearing to provide that compliance with the statute would be financially burdensome and failed to abide by the requirements of the Rules of Court." (App. 9A).

This Court has consistently held that it will intervene in the state judicial process only to correct wrongs of a federal constitutional dimension and not to interfere with

issues that are a matter of state constitutional, statutory or common law. *Smith v. Phillips*, 455 *U.S.* 209, 221 (1982). In evaluating issues concerning state law, a federal court should defer to the determinations by the state court. *Kolender v. Lawson*, 461 *U.S.* 352, 355 (1983). In this case, petitioner's tax appeal was dismissed simply as a result of petitioner's failure to comply with reasonable discovery demands relating to the issue of financial ability to pay the local property tax assessment. The dismissal of the tax appeal thus did not involve federal constitutional questions. The Tax Court had specifically provided petitioner with the opportunity to submit proofs as to its inability to pay the property taxes as well as the purported excessiveness of such taxes. Petitioner voluntarily did not pursue its legal remedies to submit appropriate proofs and should not be permitted now to raise federal constitutional challenges to the validity of *N.J.S.A.* 54:3-27 that are premised on a nonexistent factual record.

However, even if petitioner's failure to submit the proper proofs were to be overlooked, it is, nevertheless, clear, from a federal constitutional standpoint, that *N.J.S.A.* 54:3-27 is facially valid. The due process concept is flexible and requires procedural safeguards which are appropriate for a particular situation. *Morrissey v. Brewer*, 408 *U.S.* 471, 481 (1972). A tax assessment is validly imposed if the taxpayer is provided with an opportunity to challenge the levy before a competent tribunal prior to the assessment being irrevocably fixed. *Nickey v. Mississippi*, 191 *U.S.* 393, 396 (1934).

This Court has established three factors to be considered in determining whether a statutory scheme denies a party procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge*, 424 *U.S.* 319, 335 (1976)]

On a facial analysis, it is clear that *N.J.S.A.* 54:3-27 is consistent with due process concepts. First, a taxpayer's private interest is the temporary deprivation of his money. In accordance with *N.J.S.A.* 54:3-27.2, a taxpayer would be entitled to a refund from the municipality of any excess taxes paid together with interest from the date of payment at 5% per annum within 60 days of the date of final judgment.

Second, the tax appeal procedure provides a taxpayer with the full opportunity for a fair and comprehensive hearing. Petitioner already had the benefit of an initial hearing at the County Board level. At the Tax Court level, a taxpayer would be entitled to a trial *de novo* at which a full evidentiary hearing would be afforded, presided over by a Tax Court judge with special expertise in the area of property assessments. See *N.J.S.A.* 2A:3A-2 and 13; New Jersey Court Rule 8:1 *et seq.* A judgment entered by the Tax Court is further appealable as of right to the Appellate Division. New Jersey Court Rule 2:2-3 (a)(1). Thus, the administrative and judicial facets of the tax appeal process protect a litigant from any erroneous deprivation of the excess taxes.

Third, the interest of the municipality in receiving timely payment of property taxes is clearly significant and

outweighs any incidental burden imposed upon the taxpayer. The New Jersey Legislature, by enacting *N.J.S.A.* 54:3-27 and thereby requiring the payment of three quarters of an assessment in conjunction with filing an appeal at the County Board level, has recognized that tax revenues constitute the lifeblood of government and that timely payment is essential to the proper functioning of government. *Flora v. United States,* 362 *U.S.* 145, 176 (1960); *Phillips v. Commissioner,* 283 *U.S.* 589, 597 (1931). These policy considerations are particularly significant with regard to the prompt payment of a property tax which is by far the most important source of tax revenues for municipalities. *Rosewell v. LaSalle National Bank,* 450 *U.S.* 503, 527 (1981). Thus, in light of the significant interests of the municipality in securing the needed local property tax revenues, the relatively slight temporary deprivation of excess tax payments experienced by a taxpayer and the safeguarding of the taxpayer's interest through the tax appeal procedure, the taxpayer is not being deprived of due process by virtue of the payment requirement of *N.J.S.A.* 54:3-27.

In applying this analysis, this Court in *Schneider v. City of East Orange,* 196 *N.J. Super.* 587, 483 *A.*2d 839 (App. Div. 1984), aff'd 103 *N.J.* 115, — *A.*2d — (1986), *cert.* den. — *U.S.* — (1986), refused to review the decision by the New Jersey courts sustaining the constitutionality of *N.J.S.A.* 54:2-39 under due process and equal protection standards.* In *Schneider,* the New Jersey Appellate Di-

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* The equal protection issue arose in *Schneider, supra,* on the taxpayer's contention that the payment requirement under

(Continued on following page)

vision found the jurisdictional payment standard of *N.J.S.A.* 54:2-39 to be consistent with due process:

> Additionally, plaintiffs' right of due process has not been violated by such an interpretation of the statute. The critical components of due process are adequate notice, opportunity for a fair hearing and availability of appropriate review. *In re Suspension of Heller*, 73 *N.J.* 292, 310 (1977). The statutory procedures available to plaintiffs for the review of their assessments meet these requirements. *N.J.S.A.* 54:3-21, *et seq.* Plaintiffs' opportunity for appropriate review of the county board determination is not impaired by the added procedural limitation that taxes then due be paid before the jurisdiction of the Tax Court can be invoked. The interest of the municipality in receiving timely payment of taxes is clearly significant and outweighs any incidental burden imposed upon plaintiffs, and other taxpayers similarly situated, by this jurisdictional requirement. *See Mathews v. Eldridge*, 424 *U.S.* 319, 335, 96 *S.Ct.* 893, 903, 47 *L.Ed.*2d 18, 33 (1976). It is well settled that a taxpayer may be required to pay the taxes then due as a condition to litigating the amount due. *General Trading Co. v. Taxation Div. Director*, 83 *N.J.* 122,

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(Continued from previous page)

N.J.S.A. 54:3-27 (which is not jurisdictional) is less onerous than the jurisdictional payment requirement imposed by *N.J.S.A.* 54:2-39 at the Tax Court level. The taxpayer maintained that those taxpayers, whose property was assessed in excess of $750,000, could file directly with the Tax Court and only be subject to the payment standard of *N.J.S.A.* 54:3-27, while taxpayers of lesser assessed properties were subjected to the stricter payment standard of *N.J.S.A.* 54:2-39 when appealing to the Tax Court. The court in *Schneider, supra,* sustained *N.J.S.A.* 54:2-39, finding a rational basis for requiring a jurisdictional payment standard under *N.J.S.A.* 54:2-39 since taxpayers challenging county board judgments have had the benefit of a prior *quasi*-judicial hearing. 196 *N.J. Super.* at 594-595, 483 *A.*2d at 842.

129 (1980); *N.Y., Susquehanna & W.R.R. v. Vermeulen*, 44 *N.J.* 491, 501, 502 (1965). [196 *N.J. Super.* at 595-596, 483 *A.*2d at 843].

This Court found no basis for reviewing the decision in *Schneider* and should similarly deny *certiorari* in this case.

In summary, therefore, the petitioner is seeking further review of a state court decision dismissing a tax appeal because of the petitioner's failure to comply with a court-ordered discovery directive. This dismissal relates to a narrow issue of New Jersey law that does not implicate any federal constitutional standard. In addition, *N.J.S.A.* 54:3-27 provides for a reasonable and fair payment standard that complies with due process concepts.

The petition for writ of *certiorari* plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief. The decision by the New Jersey courts below involved judicial principles which were properly applied. Therefore, the petition should be denied.

———o———

CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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